CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON, PETITIONER,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 30, 1935.

CERTIORARI GRANTED FEBRUARY 10, 1936.

SUPREME COURT OF THE UNITED STATES

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J. W. TIPTON, PETITIONER,

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 27, 1936.

—7484-C

[fols. 1 & 2] Names and addresses of attorneys omitted in printing.

[fol. 3] Citation, in usual form, showing service on Robert Brennan and Leo E. Sievert, filed June 28, 1934, omitted in printing.

[fol. 4]

IN SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF FRESNO

No. 51588

J. W. TIPTON, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FÉ RAILWAY COMPANY, a Corporation, Defendant

COMPLAINT (Personal Injury)—Filed Jan. 26, 1934

Plaintiff complains of defendant and for cause of action alleges:

I

That at all times herein mentioned defendant was and now is a corporation duly organized and existing under and by virtue of the laws of the state of Kansas and domiciled in that state, and that defendant corporation at all times herein mentioned was duly authorized to do business in the State of California, and that at all times herein mentioned said defendant corporation was doing business and engaging as a common carrier by railroad in interstate commerce in Fresno County, State of California:

II

That at all times herein mentioned defendant corporation ran and operated a line of railroad over and across the County of Fresno, State of California, and defendant main-
[fol. 5] tained various places of business in said county of Fresno, State of California, and that on the tracks of defendant where the accident hereinafter — ocurred defendant maintained at all times herein mentioned a highway of

interstate commerce, [and at all times herein mentioned plaintiff and defendant were engaged in interstate commerce.]

[By consent of counsel in open court stricken out. Hollzer J. Apr. 16/34.]

III

That on or about the 21st day of September, 1932, in the town of Riverbank, State of California, at or about the hour of 2:35 o'clock A. M. of said day plaintiff was regularly employed by defendant as a switchman, and plaintiff was so employed at the time and place of the accident hereinafter alleged.

IV

That while plaintiff was employed by defendant as aforesaid, it was plaintiff's duty to assist in spotting car A. T. 9358 at a store house of defendant and to be between said car and the warehouse platform and to cross over on the opposite side of a certain yard engine to get on the footboard of said engine; that at said time and place it was the duty of a fellow employee of plaintiff named Woods to pull a cut-lever to detach said car A. T. 9358 from the engine, and that said Woods did pull said cut-lever to detach said car from the engine and upon pulling the said cut-lever the said car failed to uncouple by reason of the fact that the automatic coupling apparatus of said car was defective, inefficient and out of repair in violation of the Federal Safety Appliance Acts and in violation of Section 2 of Chapter I [fol. 6] of Title 45 on Railroads, United States Code, Annotated; that by reason of said failure of said car to uncouple as aforesaid and by reason of the fact that the clearance between said car and said warehouse platform was close, said car A. T. 9358 struck plaintiff and caused him to be injured as hereinafter set forth.

V

That by reason of the facts hereinbefore set forth and as a direct and proximate result of the failure of said car to uncouple and of the inefficient, defective condition of said coupling apparatus as aforesaid, plaintiff was rendered sick, sore, lame, disabled and disordered and his left lower leg was crushed, and he suffered a severe sclerosis, a severe injury to the bone of said leg and pitting of the bone of said

leg, together with an involvement of the nerves of said leg, together with an extreme and severe shock to his nervous system and extreme pain and suffering, and said injuries are and will be permanent.

VI

That at the time of the accident hereinbefore set forth and for a long time prior thereto plaintiff was an able bodied man and capable of earning an average salary of about $200.00 per month; that for many years prior thereto plaintiff had specially educated and trained himself for railroad service as brakeman and switchman, and that by reason of the injuries hereinbefore set forth plaintiff was wholly incapacitated to follow such business or the business of railroading and by reason thereof plaintiff has been totally incapacitated.

VII

That by reason of the facts hereinbefore set forth plaintiff has been damaged in the sum of Forty Thousand ($40,000.00) Dollars.

[fol. 7] Wherefore, plaintiff prays judgment against defendant in the sum of Forty Thousand ($40,000.00) Dollars, and for costs of suit incurred herein.

Werner & Hildebrand, by Clifton Hildebrand, Attorneys for Plaintiff, 1212 Broadway, Oakland, Calif., 535 Rowan Bldg., Los Angeles.

Duly sworn to by Clifton Hildebrand. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 8] IN SUPERIOR COURT OF FRESNO COUNTY

[Title omitted]

DEMURRER—Filed Feb. 20, 1934

Comes now the defendant above named and demurs to the complaint of the plaintiff on file herein upon the following grounds:

I

That said complaint does not state facts sufficient to constitute a cause of action against this defendant.

Robert Brennan, Leo E. Sievert, H. K. Lockwood,
Attorneys for Defendant.

[fol. 9] STATE OF CALIFORNIA,
County of Los Angeles, ss:

Ethel Magnuson, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's business address is: 436 Kerckhoff Building, 560 South Main Street, Los Angeles, California; that on the 19th day of February, 1934, affiant served the within Demurrer on the plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said plaintiff at the office address of said attorneys, as follows: (Here quote from envelope name and address of addressee.) "Messrs. Werner & Hildebrand, Attorneys at Law, 535 Rowan Building, Los Angeles, California"; and by then sealing said envelope and depositing the same, with the postage thereon fully prepaid, in the United States Post Office at Los Angeles, [fol. 10] California, where is located the office of the attorney for the person by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed, or there is a regular communication by mail between the place of mailing and the place so addressed.

Ethel Magnuson.

Subscribed and sworn to before me this 19 day of February, 1934. Nellie B. Passfield, Notary Public in and for the County of Los Angeles, State of California. (Seal.)

[File endorsement omitted.]

[fol. 11] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF CALIFORNIA, NORTHERN DIVISION

Present: The Honorable H. A. Hollzer, District Judge.

No. 718—Civ.

J. W. TIPTON, Plaintiff,

vs.

A., T. & S. F. RAILWAY COMPANY, Defendant

ORDER SUSTAINING DEMURRER WITHOUT LEAVE TO AMEND—April 16, 1934

This cause coming on for hearing on Demurrer to Complaint; Thos. F. McCue, Esq., appearing for the plaintiff, and Leo E. Sievert, Esq., appearing for the defendant,

Now, at the hour of 1:54 o'clock p. m. counsel argue to the Court, and by stipulation of counsel in open court, the balance of sentence, Line 29, page — commencing with the word "and" is stricken from the Complaint; whereupon,

The Court orders said Demurrer sustained without leave to amend, and an exception is allowed the plaintiff thereto.

[fol. 12] IN UNITED STATES DISTRICT COURT

No. 718—Civil

J. W. TIPTON, Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corp., Defendant

JUDGMENT

On the 16th day of April, 1934, this cause came on for hearing on defendant's demurrer to plaintiff's complaint, and the court made and entered an order herein, sustaining defendant's demurrer, without leave to plaintiff to

amend his complaint, and said cause is accordingly dismissed;

Now, therefore, by virtue of the law and by reason of the premises as aforesaid,

It is ordered, adjudged and decreed that this cause be, and the same is hereby, dismissed.

Costs $20.00.

Judgment entered and recorded April 28th, 1934.

R. S. Zimmerman, Clerk, by M. R. Winchell, Deputy Clerk.

[fol. 13] IN UNITED STATES DISTRICT COURT

[Title omitted]

PETITION FOR APPEAL—Filed June 28, 1934

The plaintiff, J. W. Tipton, feeling aggrieved by the judgment made and entered herein on the 28th day of April, 1934, whereby it was ordered and adjudged that plaintiff's cause of action be dismissed and granting and adjudging costs against the plaintiff, does hereby appeal from said judgment and the whole thereof, to the Circuit Court of Appeals of the United States for the Ninth Circuit, and prays that his appeal be allowed.

That a transcript of the record of the proceedings, including the minutes of the court upon the hearing of the Demurrer herein, the judgment roll upon which said judgment was entered, duly authenticated, may be sent to the [fol. 14] United States Circuit Court of Appeals for the Ninth Circuit.

Dated May 18, 1934.

Erwin P. Werner, Clifton Hildebrand, Thomas F. McCue, Attorneys for Plaintiff.

Service of the within Petition for Appeal is hereby admitted by copy this 27th day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 15] IN UNITED STATES DISTRICT COURT

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 28, 1934

The plaintiff says there is manifest error in the record herein and assigns and specifies the following as such:

1. That the court erred in entering the order on the 16th day of April, 1934, sustaining the defendant's Demurrer to plaintiff's complaint without leave to amend the same.

2. That the court erred in giving and making and entering judgment herein on the 28th day of April, 1934, which judgment dismisses plaintiff's cause of action and grants costs against the plaintiff.

[fol. 16] 3. That the judgment specified in Assignment No. 2 herein, is contrary to and against law.

Erwin P. Werner, Clifton Hildebrand, Thomas F. McCue, Attorneys for Plaintiff.

Service of the within assignment of errors is hereby admitted by copy this 27 day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

[fol. 17] IN UNITED STATES DISTRICT COURT

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 28, 1934

It appearing that the plaintiff J. W. Tipton, has heretofore filed his Petition for Appeal from the judgment made and entered herein on the 28th day of April, 1934, to the Circuit Court of Appeals of the United States for the Ninth Circuit—

It is therefore ordered, that the appeal of J. W. Tipton, from the judgment entered herein on the 28th day of April, 1934, to the United States Circuit Court of Ap-

peals for the Ninth Circuit, be and the same is hereby allowed—

[fol. 18] It is further ordered, that the plaintiff execute and furnish an undertaking for the purpose of securing costs of this appeal in the sum of $250.00.

Dated this 26 day of June, 1934.

Hollzer, United States District Judge.

Service of the within Order Allowing Appeal is hereby admitted by copy this 27 day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

[fols. 19-22] Bond on appeal for $250.00, approved and filed July 14, 1934, omitted in printing.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

PRÆCIPE FOR TRANSCRIPT OF RECORD ON APPEAL—Filed June 28, 1934

To the Clerk of the above-entitled Court:

Please make up and certify the record on appeal heretofore allowed herein and include in the transcript therein, the following:

1. The complaint.
2. The demurrer.
3. The minutes of the court taken and entered upon the hearing of said demurrer.
4. Assignment of Errors.
5. Petition for Appeal.
6. Order Allowing Appeal.

[fol. 24] 7. Citation on Appeal.

8. Cost Bond on Appeal
9. The judgment.

10. This præcipe.

Dated May 18, 1934.

Erwin P. Werner, Clifton Hildebrand, Thomas F. McCue, Attorneys for Plaintiff, and Appellant.

Service of the foregoing within præcipe is hereby admitted by copy this 27th day of June, 1934.

Robert Brennan, Leo E. Sievert, Attorneys for Defendant.

[File endorsement omitted.]

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In the District Court of the United States, Southern District of California, Northern Division.

J. W. TIPTON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendant.

CLERK'S CERTIFICATE.

I, R. S. Zimmerman, clerk of the United States District Court for the Southern District of California, do hereby certify the foregoing volume containing 24 pages, numbered from 1 to 24 inclusive, to be the Transcript of Record on Appeal in the above entitled cause, as printed by the appellant, and presented to me for comparison and certification, and that the same has been compared and corrected by me and contains a full, true and correct copy of the citation, complaint, demurrer, minute order of April 16, 1934, sustaining demurrer, judgment, petition for appeal, assignment of errors, order allowing appeal; cost bond on appeal and praecipe.

I DO FURTHER CERTIFY that the amount paid for printing the foregoing record on appeal is $31.00 and that said amount has been paid the printer by the appellant herein and a receipted bill is herewith enclosed, also that the fees of the Clerk for comparing, correcting and certifying the foregoing Record on Appeal amount to $4.00 and that said amount has been paid me by the appellant herein.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the Seal of the District Court of the United States of America, in and for the Southern District of California, Central Division, this 7th day of August, in the year of Our Lord One Thousand Nine Hundred and Thirty-four and of our Independence the One Hundred and Fifty-ninth.

R. S. ZIMMERMAN,
Clerk of the District Court of the United States of America, in and for the Southern District of California.
By R. S. ZIMMERMAN.

No. 7571

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

J. W. TIPTON,

Appellant,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

PROCEEDINGS HAD IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

United States Circuit Court of Appeals for the Ninth Circuit.

Extract from minutes of Wednesday, January 23, 1935.

Before: WILBUR and GARRECHT, Circuit Judges, and CAVANAH, District Judge.

[Title of Cause.]

ORDER OF SUBMISSION.

ORDERED appeal in above cause argued by Mr. Clifton Hildebrand, counsel for appellant, and by Mr. Leo V. Sievert, counsel for appellee, and submitted to the court for consideration and decision, with leave to counsel to file certified copy of petition for removal and order of removal, and further briefs x 5 x.

CERTIFIED COPY OF ORDER OF REMOVAL.

In the Superior Court of the State of California in and for the County of Fresno.

No. 51588.

J. W. TIPTON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendant.

PETITION FOR REMOVAL.

COMES NOW The Atchison, Topeka and Santa Fe Railway Company, a corporation, and presents this its petition for the removal of the above entitled cause to the District Court of the United States for the Southern District of California, Northern Division, and in that behalf respectfully shows:

I.

That The Atchison, Topeka and Santa Fe Railway Company, a corporation, is defendant in the above entitled action. That at the time of the commencement of said action and for a long time prior thereto said defendant was and had been a corporation organized and existing under and by virtue of the laws of the State of Kansas, with its principal place of business in the City of Topeka, in said State, and that it is not now and was not at

the time of the commencement of this action and never has been a corporation organized and existing under and by virtue of the laws of the State of California. That it was at all of said times and that it is now a citizen and resident of the State of Kansas, and that it is not now and was not at any of the times hereinbefore mentioned a citizen or resident of the State of California, but was at all of said times a citizen and resident of the State of Kansas, and a non-resident of the State of California.

II.

That the plaintiff J. W. Tipton was at the time of the commencement of said action and ever since has been and now is a citizen and resident of the State of California, and that said plaintiff was not at any of the said times and is not now a citizen or resident of the State of Kansas, but at all of said times plaintiff was and now is a non-resident of the State of Kansas.

III.

That the above entitled action is a suit of a civil nature brought by plaintiff to obtain a judgment against your petitioner for the sum of $40,000.00 as damages alleged to have been sustained by plaintiff on or about September 21, 1932, at Riverbank, California, while employed by the defendant as a switchman.

IV.

That the complaint in said action was filed on or about the 26th day of January, 1934, and was served

upon your petitioner on or about January 30, 1934, in Los Angeles, California. That according to the laws of the State of California the time within which your petitioner is required to appear, answer, demur or otherwise plead to said action has not yet expired, and your petitioner has not answered, demurred or otherwise pleaded to said complaint or appeared in said action.

V.

That the amount in controversy in the above entitled action exceeds exclusive of interest and costs the sum and value of $3,000.00.

VI.

That this is a suit between citizens of different states and which can be fully determined as between them, and that your petitioner is actually interested in such controversy.

That this is a suit arising under the laws of the United States of America and by plaintiff's complaint purports to be based upon the Safety Appliance Acts of Congress and Acts amendatory thereto; that in said complaint there appears the allegation in paragraph II thereof "and at all times herein mentioned plaintiff and defendant were engaged in interstate commerce;" that said allegation to the effect that plaintiff at the time of his alleged injury was engaged in interstate commerce is and was false and is and was at the time said complaint was filed known by said plaintiff to be false; that

said allegation was and is fraudulently made by plaintiff in his said complaint for the sole purpose of preventing your petitioner from removing the above entitled suit to the United States District Court; that said attempt on the part of plaintiff to allege that he was engaged in the furtherance of interstate transportation or in interstate commerce was false, sham and fraudulent; that at the time of filing said complaint plaintiff well knew that at the time of his alleged injury he was not engaged in the furtherance of interstate transportation nor in interstate commerce; that in truth and in fact at the time of plaintiff's alleged injury he was engaged in the spotting in the yards of the defendant at Riverbank, California, car A. T. 9358 at the store house of this defendant; that said duty of spotting said car at the storehouse of this defendant at Riverbank was the sole work with which plaintiff was engaged at the time of his alleged injury; that said car did not contain therein any shipments of interstate commerce nor any goods destined for use in interstate commerce; that there are served and filed herewith affidavits of Clifford L. Clapp, E. O. Cook, C. C. Eastman, E. C. Goodwin, S. B. McAuley, Scott Powell, and C. H. Vandegrift, which conclusively show that said car did not contain any interstate commerce, or any goods destined for use therein; that by this reference said affidavits are made a part of this petition as though fully set forth herein; that there is also served and filed herewith a certified copy of a letter written

by plaintiff himself on the 13th day of November, 1933, to the Industrial Accident Commission of the State of California, wherein plaintiff himself stated to said Industrial Accident Commission of the State of California that he, the plaintiff, knew that said car contained no interstate commerce; that by reason of the affidavits filed herewith and said certified copy of said letter it would conclusively appear that plaintiff by his said allegation in said complaint falsely and fraudulently has attempted to prevent a removal of this action by this defendant to the United States District Court.

VII.

That your petitioner offers and presents herewith a good and sufficient bond and surety as provided by the statutes in such cases, conditioned that it will within thirty (30) days from the filing of this petition enter a certified copy of the record in the above entitled cause in the United States District Court, for the Southern District of California, Northern Division, and that your petitioner will pay all costs that are awarded by the said District Court if it shall hold that said action was wrongfully or improperly removed thereto.

WHEREFORE your petitioner prays that this Court accept this petition and said bond and surety, and that said action be removed into said District Court of the United States, for the Southern District of California, Northern Division, pursuant to the statutes in such cases made and provided, and

that this Court proceed no further in this action, except to make the Order of Removal as prayed for; accept and approve the bond presented herewith, and direct the Clerk of this Court to prepare a certified copy of the record in the above entitled action for entry in the said District Court of the United States, for the Southern District of California, Northern Division.

And your petitioner will ever pray, etc.

Dated February 15th, 1934.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation,

By ROBERT BRENNAN
LEO E. SIEVERT
H. K. LOCKWOOD
Attorneys for Petitioner

A true copy, Dec. 20, 1934.

Attest, Etc. of Petition for Removal fld. in Transcript of Record in case 718-Law.

[Seal] R. S. ZIMMERMAN,
Clerk U. S. District Court, Southern District of California.

By L. Wayne Thomas,
Deputy.

In the Superior Court of the State of California in and for the County of Fresno.

No. 51588.

J. W. TIPTON,

Plaintiff,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Defendant.

ORDER OF REMOVAL.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, a corporation, defendant in the above named action, having, within the time provided by law, filed its petition in due form for the removal of said action to the District Court of the United States for the Southern District of California, Northern Division, and having at the same time offered a good and sufficient bond, as required by law, and said Bond having been approved, and it appearing to the Court that said defendant is entitled to have said cause removed to said District Court of the United States for the Southern District of California, Northern Division:

NOW, THEREFORE, IT IS HEREBY ORDERED that said action be removed into the District Court of the United States for the Southern District of California, Northern Division, and that all

further proceedings in this Court in said action be and they are hereby stayed, and the Clerk of this Court is hereby directed to make a certified copy of the record in said action for entry in said United States District Court.

DONE this 23rd day of February, 1934.

C. E. BEAUMONT

Judge

[Endorsed]: No. 51588. Filed Feb 23 1934. J. Reed Schaeffer, Clerk, By L. H. Bendoski, Deputy.

[Endorsed]: Filed Mar 19 1934. R. S. Zimmerman, Clerk, by L. Wayne Thomas, Deputy Clerk.

District Court of the United States, Southern District of California, Central Division.

United States of America
Southern District of California—ss.

I, R. S. ZIMMERMAN, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing is a full, true, and correct copy of ORDER OF REMOVAL made by the Superior Court in and for the County of Fresno, No. 51588, contained in the transcript of record filed on March 19, 1934 in this Court in the case of J. W. TIPTON, Plaintiff vs. Atchison, Topeka & Santa Fe Railway Company, a corporation, Defendant, No. 718 Civil, Northern Division, as the same appears from the original record remaining in my office.

WITNESS my hand and the seal of said Court, this 17th day of December, A. D. 1934.

R. S. ZIMMERMAN, Clerk

[Seal] By EDMUND L. SMITH, Deputy Clerk

[Endorsed]: Filed United States Circuit Court of Appeals, Jan. 23, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

Extract from minutes of Monday, June 24, 1935.

Before: GARRECHT, DENMAN and MATHEWS, Circuit Judges.

[Title of Cause.]

ORDER DIRECTING FILING OF OPINION AND FILING AND ENTRY OF JUDGMENT.

By direction of the court, ORDERED that the typewritten opinion this day rendered by this court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this court in accordance with the opinion filed.

[Title of Court and Cause.]

OPINION.

Upon Appeal from the District Court of the United States for the Southern District of California, Northern Division.

Before: WILBUR and GARRECHT, Circuit Judges, and CAVANAH, District Judge.

GARRECHT, Circuit Judge:

Appellant filed in the Superior Court of the State of California for the County of Fresno a complaint alleging that defendant corporation was authorized to do business in the State of California, and was doing business as a common carrier by railroad of interstate commerce and that its tracks were maintained as a highway of interstate commerce; that he was employed by defendant as a switchman; that while assisting in "spotting" a car at a storehouse of defendant in the town of Riverbank in said state, he was injured because a defective cut-lever used in detaching the car failed to operate when manipulated by a fellow employee; that by reason of such defective uncoupling appliance appellant was crushed between the care and the storehouse platform, being severely injured. Claiming to have been totally incapacitated, he prayed damages in the sum of $40,000.

Appellee, a Kansas corporation, had the cause removed to the Federal District Court. That court granted appellee's demurrer, interposed upon the

ground that the complaint did not state facts sufficient to constitute a cause of action, and dismissed the cause without leave to amend. Plaintiff appeals.

Plaintiff bases his case upon the contention that defendant's railroad was engaged in interstate commerce and that its tracks were, therefore, a "highway of interstate commerce", thereby bringing his action within the Safety Appliance Acts.

Defendant contends that the complaint fails by proper averment to allege that at the time of his injury plaintiff was engaged in interstate commerce and, therefore, the laws of the State of California did not give him a right of action, but that he was required to proceed before the State Industrial Accident Commission. Plaintiff insists that he is not so limited in his remedy, but because the Federal government has legislated in the field, the State is effectively barred therefrom (by the Safety Appliance Acts), and, therefore, the Workmen's Compensation Act has no application.

Plaintiff does not predicate his action upon the Federal Employers' Liability Acts; it is well settled that such Acts do not afford a remedy unless the employee was engaged in interstate commerce at the time the injury was suffered. Ill. Central R. R. Co. v. Behrens, 233 U. S. 473.

Appellant cites a line of cases,* presumably fol-

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*McMahon v. Montour R. Co., 270 U. S. 628, reversing 128 Atl. 918; Ross v. Schooley, 257 Fed. 290 (C. C. A. 7), cert. den. 249 U. S. 615; Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, cert. den.

lowing Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, which hold that where a cause of action arising in intrastate commerce falls within the Federal Safety Appliance Acts, it is not subject to state compulsory workmen's compensation, but that an injury arising out of violation of the Safety Appliance Acts gives rise to an action for compensatory damages.

The Safety Appliance Acts were designed "to promote the safety of employees and travelers" and Ross v. Schooley, cited in the margin, proceeded upon the assumption or under the rule that the persons for whose benefit or protection a statute is enacted are entitled to compensation for violation of it, if they are injured by or through such violation. That case went on to say that "It is immaterial whether the injured employee was at the moment engaged in interstate or intrastate commerce, * * *" and concluded that the "operativeness" of the act was not dependent upon the legislative wills of the several states. The Ballard case, cited in the margin, supra, decided by the State District Court of Appeals, adhered to this doctrine and held that the Workmen's Compensation Act of the State of California did not apply.

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256 U. S. 696; Ballard v. Sacramento No. R. Co., 126 Cal. App. 486; 14 P. (2) 1045; Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618; Kenna v. Calumet, H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3; Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1; Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847.

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Appellant places great reliance upon Texas & Pacific Ry. v. Rigsby, 241 U. S. 33. In the opinion (p. 41) there appear the words:

> "* * * In the exercise of its plenary power to regulate commerce between the States, Congress has deemed it proper, for the protection of employees and travelers, to require certain safety appliances to be installed upon railroad cars used upon a highway of interstate commerce, irrespective of the use made of any particular car at any particular time. Congress having entered this field of regulation, it follows from the paramount character of its authority that state regulation of the subject-matter is excluded. * * * Without the express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws giving redress for injuries to workmen or travelers occasioned by the absence or insecurity of such safety devices, any more than laws prescribing the character of the appliances that shall be maintained, or imposing penalties for failure to maintain them; for the consequences that shall follow a breach of the law are vital and integral to its effect as a regulation of conduct, liability to public prosecution, and in this respect there is no distinction dependent upon whether the suitor was injured while employed or traveling in one kind of commerce rather than the other. Hence, it may be con-

ceded, for the purposes of the argument, that the mere question of compensation to persons injured in intrastate commerce is of no concern to Congress, it must be held that the liability of interstate carriers to pay such compensation because of their disregard of regulations established primarily for safeguarding commerce between the States, is a matter within the control of Congress; for unless persons injured in intrastate commerce are to be excluded from the benefit of a remedial action that is provided for persons similarly injured in interstate commerce—a discrimination certainly not required by anything in the Constitution—remedial actions in behalf of intrastate employees and travelers must either be governed by the acts of Congress or else be left subject to regulation by the several States, with probable differences in the law material to its effect as regulatory of the conduct of the carrier. We are therefore brought to the conclusion that the right of private action by an employee injured while engaged in duties unconnected with interstate commerce, but injured through a defect in a safety appliance required by the act of Congress to be made secure, has so intimate a relation to the operation of the Act as a regulation of commerce between the States that it is within the constitutional grant of authority over that subject."

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But the latest pronouncement of the Supreme Court of the United States—Gilvary v. Cuyahoga Valley Ry. Co., 292 U. S. 57—does not support this contention. In that case plaintiff, while engaged in intrastate commerce, was injured, so he alleged, by failure of defendant to comply with the Safety Appliance Acts. Judgment of the Ohio Court of Appeals for respondent was affirmed by the Supreme Court of Ohio, 188 N. E. 4, by a divided court. Certiorari was sought in the Supreme Court of the United States, and granted. In accordance with the Ohio (where the action arose) workmen's compensation act, petitioner and respondent had theretofore notified the industrial accident commission that they elected, in case of any injury sustained by petitioner while engaged in intrastate commence, to have their respective rights and liabilities governed by the provisions of that act.

The Supreme Court stated the question in this fashion:

> "As the petitioner when injured was not engaged in interstate commerce, the Federal Employers Liability Act does not apply, and the question is whether the agreement of the parties, in pursuance of the Ohio statute, is repugnant to the Federal Safety Appliance Acts."

At page 61 (of 292 U. S.) it is said:

> "Petitioner cites language in Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41. But that case is not in point on the question under con-

sideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these Acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee through the breach 'sprang from the principle of the common law' and was left to be enforced accordingly, or in case of death 'according to the applicable statute.' * * * These Acts do not create, prescribe the measure or govern the enforcement of, the liability arising from the breach. They do not extend to the field occupied by the state compensation Act. There is nothing in the agreement repugnant to them."

The Supreme Court, in Moore v. Chesapeake & Ohio Ry. Co., 291 U. S. 205, 215, discusses the Acts as follows:

"* * * The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. The original Act of 1893 made no provision for suits, except for penalties. That Act did impliedly recognize the employee's right of action by providing in Sec. 8 that he should not be

deemed to have assumed the risk or injury occasioned by the breach of duty. But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be the beneficiaries of recovery, in cash of death of the employee. While dealing with the assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. * * * In these respects the amended Act of 1903 made no change, notwithstanding the enlargement of the scope of the statutory requirements. The Act of 1910, by a proviso in Sec. 4 relating to penalties (36 Stat. 299), provided that nothing in that section should 'be construed to relieve such carrier from liability in any remedial action for the death or injury of any railroad employee' caused by the use of the prohibited equipment.

"The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law (Texas & Pacific R. Co., v. Rigsby, supra, at pp. 39, 40) and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute. * * * With respect to injuries sustained in intrastate commerce, nothing in the Safety Appliance Acts

precluded the State from incorporating in its legislation, applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. As this court said in Minneapolis, St. P. & S. S. M. Ry. Co. v. Popplar, supra [237 U. S. 369], as to an action for injuries sustained in intrastate commerce: 'The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.' "

We note that the Ohio workmen's compensation act in the Gilvary case, supra, was voluntary in the instance just referred to, while the California Act is compulsory. On this basis appellant asserts that the Gilvary case is not applicable because, under an elective system, the parties put their rights in contract.

As the Supreme Court said in the Gilvary case, supra, the question is one of repugnancy to the Safety Appliance Acts. If the agreement in that case was not repugnant to the Acts, how can it be said that a compulsory statute, which accomplishes the same purpose is inconsistent therewith? If the

State Law can provide that the parties may agree to apply the Workmen's Compensation law, then, in view of the results to be accomplished, the State law may imply or compel the agreement.

We think particularly significant the language of the Supreme Court in Minneapolis, St. P. & S. S. M. Ry. Co. v. Popplar, 237 U. S. 369, 372 (quoted in the Moore case, supra):

> "The action fell within the familiar category of cases involving the duty of a master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The Federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the State. * * *"

We conclude that irrespective of the compulsory features of the state law, under the decisions above noted, the enforcement is to be had under the applicable state statute. And the applicable state statute in this instance is the Workmen's Compensation Act.

The Safety Appliance acts merely eliminate the defense of assumption of risk; they do not bar the defense of contributory negligence (as pointed out in the Moore case, supra). The Workmen's Compensation Act affords the remedy.

> "The obvious intent of the [Workmen's Compensation] act was to substitute its procedure

for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages, with their pleas of negligent acts or omissions in the way of providing suitable places to work, or proper appliances and the like; and with their defenses of assumed risks or of the negligence of fellow servants, or of contributory negligence; and with the uncertainties or inequities incident to jury trials; all elements of damage, defense, or consequence, * * *."

Cooper v. Industrial Acc. Com., 177 Cal. 685, 687.

The Safety Appliance Acts do not furnish a remedy, nor the machinery therefor, but merely imply a remedy and limit the available defenses, where the injury is caused through violation of such Acts. The injury not arising out of interstate commerce, the remedy is to be found in the state statutes—in this case, the Workmen's Compensation Act.

In view of the fact that counsel for appellee concedes the cause to have been properly removed from the State court, and after inspection of the certified copies of the removal papers, heretofore filed, and no objection being made, the motion of appellant for diminution of the record is granted.

Judgment affirmed.

[Endorsed]: Opinion. Filed June 24, 1935. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals
For the Ninth Circuit.

No. 7571.

J. W. TIPTON,

Appellant,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a corporation,

Appellee.

JUDGMENT.

UPON APPEAL from the District Court of the United States for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the District Court of the United States for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is affirmed, with costs in favor of the appellee and against the appellant.

IT IS FURTHER ORDERED AND ADJUDGED by this Court that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

[Endorsed]: Filed and entered Jun 24 1935. Paul P. O'Brien, Clerk.

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United States Circuit Court of Appeals for the Ninth Circuit.

Extract from minutes of Monday, October 21, 1935.

Before: WILBUR, GARRECHT and HANEY, Circuit Judges.

[Title of Cause.]

ORDER DENYING PETITION FOR A REHEARING.

Upon consideration of appellant's petition, filed August 21, 1935, for a rehearing of above cause, and of his supplemental authorities in support of petition, filed August 31 and September 6th, and of reply of appellee thereto, filed September 18th, and by direction of the court, IT IS ORDERED that the petition for rehearing be, and hereby is denied.

[Title of Court and Cause.]

CERTIFICATE OF CLERK, U. S. CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, TO RECORD CERTIFIED UNDER RULE 38 OF THE REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES.

I, PAUL P. O'BRIEN, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing fifty-one (51) pages, numbered from and including 1 to and including 51, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 23 day of November, A. D. 1935.

[Seal] PAUL P. O'BRIEN,
Clerk.

[fol. 53] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 10, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 40,218. U. S. Circuit Court of Appeals, Ninth Circuit. Term No. 664. J. W. Tipton, Petitioner, vs. Atchison, Topeka & Santa Fe Railway Company. Petition for a writ of certiorari and exhibit thereto. Filed December 30, 1935. Term No. 664, O. T., 1935.

(7484-C)

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,

Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),

Respondent.

PETITION FOR WRIT OF CERTIORARI

to the United States Circuit Court of Appeals for the Ninth Circuit.

HERMAN A. BACHRACK,
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Attorney for Petitioner.

CLIFTON HILDEBRAND,
Bank of America Building, Oakland, California,
LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
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Of Counsel.

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In the Supreme Court
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United States

OCTOBER TERM, 1935

No.

J. W. TIPTON,
Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Circuit Court of Appeals for the Ninth Circuit.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

Petitioner J. W. Tipton prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above entitled cause on June 24, 1935.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 78 Fed. (2d) 450 [R. 39].

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on June 24, 1935. Petitioner's petition for rehearing therein was denied October 21, 1935.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

The pertinent statutes involved are the Federal Safety Appliance Act, Safety Appliance Act of March 2, 1893 (Title 196, Section 2, 27 Statutes 531); California Workmen's Compensation Act (Cal. Stat. 1917, p. 831, as amended by Cal. Stat. 1919, p. 912, Cal. Stat. 1923, p. 375, and Cal. Stat. 1929, p. 430). Applicable excerpts therefrom will be found in the Appendix.

QUESTION PRESENTED.

Did the Circuit Court of Appeals err in deciding—directly contra to the California courts' construction of the California Statutes—in a case removed to the United States District Court in California from a state court on the ground of diversity of citizenship—that a California railroad employee injured due to

a violation by his railroad employer of the Federal Safety Appliance Act, on a highway of interstate commerce, while both the employer and employee were engaged in *intrastate* rather than *interstate* commerce, had no right to sue for damages under applicable California statutes and that his sole remedy was to recover compensation under the provisions of the compulsory California Workmen's Compensation Act?

STATEMENT OF THE CASE.

Petitioner's complaint alleged that petitioner was injured while in the employ of the Southern Pacific Company, a corporation, on a highway of interstate commerce, by reason of a defective coupler maintained by the railroad company in violation of Section 2 of Title 197 of the Act of March 2, 1893 (Safety Appliance Act), and prayed for general damages proximately resulting from such defect.

The District Court sustained a general demurrer to the complaint without leave to amend and the Circuit Court of Appeals of the Ninth Circuit affirmed this judgment on the ground that the sole remedy of the petitioner was under the California Workmen's Compensation Act, a compulsory statute containing special provisions affecting railroad employees, and that the petitioner did not have a cause of action for general damages.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in holding that the California Workmen's Act (a compulsory act) was the sole remedy of the petitioner for a violation of the Federal Safety Appliance Act.

REASONS WHY WRIT SHOULD BE GRANTED.

I.

THE CIRCUIT COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF LOCAL LAW, IN CONFLICT WITH APPLICABLE LOCAL CALIFORNIA STATE COURT DECISIONS.

In the case of *Ballard v. Sacramento Northern Railroad,* 126 Cal. App. 486, the District Court of Appeal of California passed on the peculiar and special provisions of the compulsory California Workmen's Compensation Act and directly held that the applicable state statute in California was NOT the California Workmen's Compensation Act, and that a railroad employee engaged upon a highway of interstate commerce, but at the time engaged in intrastate commerce, had a right of action under general California Statutes governing actions for damages, against the railroad company for damages for violation of the duty imposed under the Federal Safety Appliance Act. In a decision rendered on July 3, 1935, the District Court of Appeal of California, in the case of *Walton, Administratrix v. Southern Pacific Company,* 48 Pac. (2d) 108 (not yet officially reported) again directly held, expressly following *Ballard v. Sacramento Northern Railroad,* supra, to the same effect. Petition of the South[illegible]n Pacific Company for writ of certiorari

in the *Walton* case was denied by this court on December 9, 1935 (*Southern Pac. Co. v. Walton*, Oct. term 1935 No. 548). The foregoing cases are *directly contrary* to the holding of the Circuit Court of Appeals in the instant case.

This court has held, that the remedy in a case of this kind is solely one to be determined under applicable state law by a state court.

Gilvary v. Cuyahoga Valley Railroad, 292 U. S. 57.

This court accepts the meaning and scope given to a State Workmen's Compensation Act, by a local state court.

Thornton v. Duffy, 254 U. S. 361;
Burns Mtg. Co. v. Fried, 292 U. S. 487.

The California court in its decision in *Walton v. Southern Pacific Company*, supra, fully discussed and considered the decisions of this court in *Moore v. C. & O. R. Co.*, 291 U. S. 205 and *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57, and after such consideration and discussion followed the rule established in the case of *Ballard v. Sacramento Northern R. Co.*, supra. The California court therefore, called upon to consider *the applicable state statute*, reaffirmed and followed its former decision after a consideration of the Moore and Gilvary cases decided by this court.

In the case of *Gilvary v. Cuyahoga*, supra, the Ohio court had held that an *election* by an employee to accept the provisions of the Ohio Workmen's Compensation Act confined the employee to the Compensation Act as his sole remedy. All that this court held in

that case was that the scope and effect given the Elective Compensation Act of Ohio by the Ohio court was not repugnant to the provisions of the Safety Appliance Act and *this court therefore accepted the meaning and scope given to the Ohio Workmen's Compensation Act by the Ohio court.* It should do likewise in the instant case.

II.

THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS.

The decision below conflicts with the decision in *Ross v. Schooley,* 257 Fed. 290 (C. C. A. Seventh) certiorari denied, 249 U. S. 615 and *Director General v. Ronald,* 265 Fed. 138 (C. C. A. Second).

In *Ross v. Schooley* (and Director General v. Ronald followed the same) the court held that Congress had created the liability for damages due to violation of the Safety Appliance Act and that state legislatures cannot alter or impair that Federal Act by the passage of compulsory Compensation Acts. In so holding the Seventh Circuit following the decision of this court in *Texas Railroad v. Rigsby,* 241 U. S. 33.

The decisions in *Ross v. Schooley,* supra, and *Director General v. Ronald,* supra, find support in the following eminent authorities:

McMahon v. Montour R. Co., 270 U. S. 628, reversing 128 Atl. 918;

Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, certiorari denied, 256 U. S. 696 (*decision by Mr. Justice Cardozo then sitting in New York Court of Appeals*);

Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618;
Kenna v. Calumet H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3;
Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1;
Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847;
Geraghty v. Lehigh Valley R. Co., 70 Fed. (2d) 300;
Anderson v. C. & O., 252 Ill. 561, 186 N. E. 185, certiorari denied by Supreme Court, 290 U. S. 675.

CONCLUSION.

It is respectfully submitted that this petition should be granted.

Dated, San Francisco, California,
December 23, 1935.

HERMAN A. BACHRACK,
Attorney for Petitioner.

CLIFTON HILDEBRAND,
LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
Of Counsel.

(Appendix Follows.)

Appendix

I.

Safety Appliance Act.

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

(Mar. 2, 1893, c. 196 §2, 27 Stat. 531.)

California Workmen's Compensation Act.

Section 6.

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against any employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: * * *

b. Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for injury or death. * * *"

Stat. 1929, p. 430.

Section 69.

"c. This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the constitution of the United States or the acts of congress."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,
Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

SUPPLEMENT TO PETITION FOR WRIT OF CERTIORARI to the United States Circuit Court of Appeals for the Ninth Circuit.

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Russ Building, San Francisco, California,
Of Counsel.

cited in *Geraghty v. Lehigh Valley R. Co.*, 70 F. (2d) 300 (C. C. A. 2), decided April 16, 1934, and we had assumed that the court in the latter case was unaware of the decision in the former. However, we now find from *Geraghty v. Lehigh Valley R. Co.*, 11 F. Supp. 378 (D. C. N. Y.), that there was a motion or petition expressly bringing the *Gilvary* case, supra, to the attention of the Circuit Court of Appeals.

(2) The case of *Leuthe v. Erie R. Co.*, 12 F. Supp. 161 (D. C. N. Y.), is in square conflict with the decision at bar, indicating increasing confusion on the subject.

(3) The Federal conflict has been made the basis of a note, just published, in the January, 1936, number of Harvard Law Review (49 Harv. L. R. 456).

Dated, San Francisco, California,
January 20, 1935.

Respectfully submitted,

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CLIFTON HILDEBRAND,
LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
Of Counsel.

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In the Supreme Court

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United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,
Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

BRIEF FOR PETITIONER.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,
Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),
Respondent.

BRIEF FOR PETITIONER.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 78 Fed. (2d) 450. (R. 39.)

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

(a) The judgment of the Circuit Court of Appeals was entered on June 24, 1935. (R. 50.) Appellant's petition for a rehearing therein was denied on October 21, 1935. (R. 51.)

(b) The ruling made in the lower court, relied on as the basis of this court's jurisdiction, is the judgment sustaining respondent's demurrer to appellant's complaint without leave to amend, and dismissing appellant's cause of action. (R. 12.)

(c) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

(d) This court granted certiorari on February 11, 1936.

STATEMENT OF THE CASE.

The complaint, demanding $40,000.00 damages in an ordinary civil action at law, was filed in the Superior Court, Fresno County, a state court of general jurisdiction of all civil cases at law (Calif. Const. Art. VI, sec. 5), in which the demand amounts to more than $2000.00 (Cal. Stats. 1933, p. 1806, at 1811-1812; C. C. P. §89), and the cause was removed to the United States District Court, Southern District, Northern Division. (R. 10.) The complaint is laid on a breach of the statutory duty imposed by 45 U. S. C. §2 (automatic couplers), as extended by 45 U. S. C. §8, to "any railroad engaged in interstate commerce"; and alleges, in paragraph I,

> "* * * that at all times herein mentioned said defendant corporation was doing business and engaging as a common carrier by railroad in interstate commerce in Fresno County, State of California",

and in paragraph II:

> "That at all times herein mentioned defendant corporation ran and operated a line of railroad over and across the County of Fresno, State of California, and defendant maintained various places of business in said county * * * and that on the tracks of defendant where the accident hereinafter referred to occurred, defendant maintained at all times herein mentioned a highway of interstate commerce."

Paragraphs III and IV allege, in substance, the infliction of injury upon plaintiff, while employed by defendant as a switchman, caused by a defective coupler, in the course of a switching operation on said tracks, at Fresno, Calif., September 21, 1932; paragraphs V and VI set forth the injuries proximately resulting therefrom; and paragraph VII lays an *ad damnum* in the sum of $40,000.00.

The demurrer was general, "that said complaint does not state facts sufficient to constitute a cause of action against this defendant". (R. 8.)

The demurrer was sustained without leave to amend (R. 11), the learned District Judge being of the opinion that plaintiff's exclusive remedy was under the California Workmen's Compensation, Insurance and Safety Act, and that therefore the plaintiff had not stated, and by any amendment could not state, a cause of action for damages.

The clerk entered judgment accordingly. (R. 12.)

The Circuit Court adopted this view and sustained the judgment on the same ground.

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred in holding that the California Workmen's Compensation Act (a compulsory act) was the sole remedy of the appellant for damages resulting from a violation of the Federal Safety Appliance Act, and in sustaining the demurrer on that ground.

QUESTION PRESENTED.

Did the Circuit Court of Appeals err in deciding—directly contra California court's construction of the California Statutes—in a case removed to the United States District Court in California from a state court on the ground of diversity of citizenship—that a California railroad employee injured due to a violation by his railroad employer of the Federal Safety Appliance Act, on a highway of interstate commerce, while both the employer and employee were engaged in intrastate rather than interstate commerce, had no right to sue for damages and that his sole remedy was to recover compensation under the provisions of the compulsory California Workmen's Compensation Act?

SUMMARY OF ARGUMENT.

The sole question before the court for determination is—whether or not the complaint on file herein, states a cause of action for general damages. The injuries sustained by appellant were directly caused by a

violation by the railroad company of the Federal Safety Appliance Act (45 U. S. C. A. 2) while plaintiff was engaged in intrastate commerce in California on a highway of interstate commerce. It is beyond question that a violation of the duty, thereby created, gives rise to a cause of action in favor of an employee proximately injured thereby. The question for determination, therefore, is the form of remedy afforded the employee for a violation of this duty.

It cannot be gainsaid that the remedy arises either:

1. Under the terms of the Federal Safety Appliance Act, itself; or

2. Under applicable state law.

If the Safety Appliance Act governs the remedy, it is beyond dispute that the complaint states a cause of action.

On the other hand, if the remedy is governed by state law, the California courts have held that the remedy is a civil action for damages under general California statutes, and that the compulsory California Workmen's Compensation Act is not the applicable state statute.

In such event, therefore, the complaint also states a cause of action. Consequently whether the remedy is governed by the terms of the Federal Safety Appliance Act or is governed by the applicable state statute, the complaint on file herein states a cause of action for general damages.

ARGUMENT.

I.

THE FEDERAL SAFETY APPLIANCE ACTS CREATE A RIGHT, WHICH CANNOT BE ABROGATED BY A COMPULSORY STATE WORKMEN'S COMPENSATION ACT.

As heretofore stated, the sole question for determination by this court is whether or not the complaint on file herein states a cause of action for general damages. The injuries sustained by appellant Tipton are alleged in the complaint to have been directly and proximately caused by a defective coupler maintained upon a railroad car by respondent railroad company, contrary to the requirements of the Federal Safety Appliance Act. (45 U. S. C. A. 2.) It has never been questioned, and in fact has frequently been affirmatively determined in decisions of this court and other federal courts as well as state courts, that the Federal Safety Appliance Act imposes a specific duty and obligation upon railroad companies.

It is now beyond dispute that the safety Appliance Acts apply to cars in use on a highway of interstate commerce regardless of the type of commerce (inter or intrastate) in which the cars are being used.

Texas & P. R. Co. v. Rigsby, 241 U. S. 33;
Moore v. C. & O. Ry., 291 U. S. 205;
45 U. S. C. A. §8.

It is also beyond dispute that the duty thus laid upon the railroad gives rise to a correlative *right* in favor of an employee proximately injured by reason of a violation of this duty regardless of the type of

commerce in which the employee was engaged when injured.

Cases supra;

Fairport Ry. v. Meredith, 292 U. S. 589;

U. S. v. California, 56 S. Ct. 421 (Feb. 3, 1936), 80 L. ed. 367.

Since this right is a creation of the federal statute, it must be conceded that, if the remedy is also a creation of the federal statute, no mandatory state Workmen's Compensation Act can destroy either.

Ward v. Erie Ry., 230 N. Y. 230 (certiorari denied 256 U. S. 696) and cases therein cited.

Assuming that the remedy (which is nothing more or less than a cause of action for the violation of the right) afforded, for the violation of the duty, is not a creation of federal law, but has been left to the states, the question still remains as to whether or not the state can *abrogate* the right of action given by the common law by adopting a compulsory compensation act.

From the decision of this court in *Texas & Pac. Ry. v. Rigsby,* 241 U. S. 33, to the decisions of this court during the 1933 October term hereinafter referred to, it was the almost unanimous opinion of the bar and of the federal and state bench that the *right and the remedy were* creations of the federal statute. The arguments proving the basic soundness of this position and the reasons therefor, are set forth in the *Rigsby* case, supra, and are clearly expressed in the majority opinion of the Court of Appeals of New York in *Ward v. Erie Ry.,* supra, as follows:

"The plaintiff has a remedy under (the Safety Appliance) act, unless the Workmen's Compensation Act of New York (Consol. Laws, c. 67) has taken it away from him. The defendant concedes that this could not be done if the remedy as well as the right was the creation of the federal statute. The argument is, however, that all that Congress did was to clothe the employee with a right and the carrier with a duty, leaving the remedy, in case of infringement, to the law of the locality. It is a rule of the common law that a member of the class for whose benefit a statute has been enacted has a right of action against the offender for the damages sustained. Texas & Pac. Ry. Co. v. Rigsby, supra, 241 U. S. at page 39, citing 1 Comyn Dig. Tit. Action upon Statute, F; Martin v. Herzog, 228 N. Y. 164, 168, 126 N. E. 814. The remedy for violation of the federal statute is given, it is said, not by the statute, but by the common law of the locality, and what the locality has given the locality may change. This argument, rejected by the trial court, was sustained at the Appellate Division, and the complaint dismissed.

We reach a different conclusion. We find the inference irresistible that the plaintiff's remedy, like his right, has a statutory origin. That was the ruling of the Circuit Court of Appeals for the Seventh Circuit in Ross v. Schooley, 257 Fed. 290, 168 C. C. A. 374, certiorari denied, 249 U. S. 615, 39 Sup. Ct. 390, 63 L. Ed. 803, where the same question was presented. We may assume that, if the purpose of the statute was merely to impose a duty, without creating or preserving a right of action for the damages, the states could abrogate the right of action that would attach at

common law. Whether the assumption is a sound one, we need not now determine. If the purpose was, however, not merely to impose a duty, but also to create or preserve a right of action for the damages, the right of action so established is immune from impairment except by act of Congress. N. Y. Central R. R. Co. v. Winfield; So. Pac. Ct. v. Jensen; Knickerbocker Ice Co. v. Stewart, supra. The creation or preservation of a remedy may, of course, result from implication as well as from express words, if the intention is apparent. Smith v. Alabama, 124 U. S. 465. The question is simply one of statutory construction—of the purpose of the lawmakers.

Here there are two provisions that unmistakably reveal the purpose to give to the right of action for damages then attaching at common law a statutory confirmation and a statutory sanction. The act provides (27 Stat. 532, Act March 2, 1893, ch. 196, §8) that any employee injured by any locomotive, car, or train in use contrary to the statute 'shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge'. This provision assumes the existence of a remedy and limits the available defenses. The regulation of the remedy is equivalent to a declaration that a remedy there shall be. The states were without power, with that statute on the books, to make assumption of risk through continuance in employment an answer to a suit. Congress did not mean that they should have the power to destroy the right of action which they were powerless to impair. The supplementary act of 1910 (36 Stat.

L. 299) reinforces this conclusion. It provides that the penalty of $100 for each violation of its provisions shall not be construed 'to relieve such carrier from liability in any remedial action for the death or injury of any railway employee'. The Supreme Court, referring to these two provisions in Texas & Pac. Ry. Co. v. Rigsby, supra, at page 40 of 241 U. S., said of them that 'the inference of a private right of action' was thereby 'rendered irresistible'.

We build the right of action on the statute. We look to the common law in determining the implications of the statute, the things assumed and held for granted. Murray v. Chicago & N. W. Ry. Co. (C. C.), 62 Fed. 24, 31. That is the background in which its language finds a setting. Congress knew the ancient rule which gives a remedy in these circumstances for violation of a duty. With that knowledge, it left to allusion and suggestion the things that allusion and suggestion were sufficient to supply. The only question is whether it left the gaps so wide that in the process of filling them interpretation fades into conjecture. We think our reading of the act is not subject to that reproach. The Statute in scheme and framework is instinct with plan and purpose to maintain a remedy and fortify it. The will of Congress is expressed in abbreviated signs and symbols, but none the less it is expressed. Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, should be dependent for its efficacy upon the pleasure of the states. It is written there in substance: Any one for whose benefit this statute is enacted shall have, in case of viola-

tion, a right of action for his damages, and it shall no longer be a defense that there was service with knowledge of the risk."

This view has been followed in the following cases involving compulsory compensation acts:

McMahon v. Montour R. Co., 270 U. S. 628, reversing 128 Atl. 918;

Ross v. Schooley, 257 Fed. 290 (C. C. A. 7), certiorari denied, 249 U. S. 615;

Ward v. Erie R. Co., 230 N. Y. 230, 129 N. E. 886, certiorari denied, 256 U. S. 696;

Geraghty v. Lehigh Valley Ry., 70 Fed. (2d) 300, 11 Fed. Supp. 378;

Leuthe v. Erie Ry., 12 Fed. Supp. 161;

Miller v. Reading Co., 292 Pa. 44, 140 Atl. 618;

Kenna v. Calumet, H. & S. E. R. Co., 284 Ill. 301, 120 N. E. 259, 262-3;

Flanigan v. Hines, 108 Kan. 133, 193 Pac. 1077, 1080-1;

Kraemer v. Chicago & N. W. R. Co., 148 Minn. 310, 181 N. W. 847;

Southern Pac. v. Henderson, 208 S. W. 561 (Tex.).

The foregoing cases deal with compulsory workmen's compensation laws of Illinois (*Ross v. Schooley; Kenna v. Calumet, H. & S. E. R. Co.*), New York (*Ward v. Erie R. Co.; Geraghty v. Lehigh Valley Ry.*, and *Leuthe v. Erie Ry.*), California (*Southern Pac. v. Henderson*), Pennsylvania (*McMahon v. Montour R. Co.; Miller v. Reading Co.*), Minnesota (*Kraemer v.*

Chicago & N. W. R. Co.), and Kansas (*Flanigan v. Hines*).

The case of *McMahon v. Montour R. Co.*, supra, is an authority squarely in point in favor of appellant. There the plaintiff railroad employee brought an action to recover for personal injuries, relying upon the Safety Appliance acts; he was not engaged in interstate commerce at the moment of injury; the state court denied him a right of recovery, saying *inter alia:*

> "The state of Pennsylvania has made ample provision for employees, who are injured in the course of their employment, in what is known as the Workmen's Compensation Act; to the tribunal provided in that statute the plaintiff in this case has recourse, and, in our opinion, to it alone." (283 Pa. 274, 128 Atl. 918.)
>
> "The Supreme Court of the United States granted a writ of certiorari (268 U. S. 686) and thereafter, on submission of the cause, reversed the judgment of the State Court in a memorandum opinion, saying:
>
> 'Per Curiam: Reversed with costs, upon the authority of Southern R. Co. v. United States, 222 U. S. 20; Texas & P. R. Co. v. Rigsby, 241 U. S. 33, 37.' " (270 U. S. 628.)

In *Ross v. Schooley,* supra, the Circuit Court of Appeals, Seventh Circuit, speaking through Circuit Judge Baker, said:

> "Inasmuch as the Congress has created the liability for damages for injury or death resulting from violation of the Safety Appliance Act, no

state Legislature can alter or impair the federal right by passing compensation acts.

It is immaterial whether the injured employe was at the moment engaged in interstate or intrastate commerce, because the congressional power that was called into play was the power to prescribe the equipment of interstate carriers for the protection of all persons upon such roads, both employes and travelers, regardless of their participation in interstate commerce. A state Legislature, therefore, has no more power to curtail the federal right of an employe than of a traveler.

What effect a state compensation law has upon the right under the Safety Appliance Act of an employe, who was injured through defective appliances while coupling intrastate cars on an interstate railroad, has not been directly involved in any case in the Supreme Court cited by counsel or found by us. But our conclusion, which rejects a result that would make the operativeness of the act dependent upon the legislative wills of the several states, and which aligns that act with the Employers' Liability Act in substantive and procedural effect, is supported by our understanding of Schlemmer v. Buffalo, etc. Ry. Co., 205 U. S. 1; St. Louis, etc. Ry. Co. v. Taylor, 210 U. S. 281; Delk v. St. Louis, etc. Ry. Co., 220 U. S. 580; North Carolina Ry. Co. v. Zachary, 232 U. S. 248; Southern Ry. Co. v. R. R. Com. Ind., 236 U. S. 439; Texas etc. Ry. Co. v. Rigsby, 241 U. S. 33; New York, etc. Ry. Co. v. Winfield, 244 U. S. 147."

In *Miller v. Reading Co.*, supra, the Supreme Court of Pennsylvania said:

"The argument is made that, though the Workmen's Compensation Law is inapplicable to a case falling within the scope of the Federal Employers' Liability Law, because then interstate commerce is involved, yet the same is not true where the accident occurs in an intrastate movement, for in such instances the local legislation must fix the relative rights of the master and servant. Congress has seen fit to provide that certain appliances shall be used by railroads engaged in business between the States, or connected with others furnishing such service, and, for the protection of all, the performance of certain duties is made requisite. Recovery may be had by employees, irrespective of the character of their work at the particular moment of injury, when there has been a violation of the requirements as to the use of safety appliances. These rights of the one injured are not affected by the Workmen's Compensation Act, for the same underlying reasons which led to the conclusion that the Federal Employers' Liability Act may notwithstanding be enforced.

McMahon v. Montour R. R. Co., supra.

Attention has been called to a decision in which a contrary view is expressed (D. L. & W. R. R. Co. v. Peck (C. C. A.), 225 F. 261), but a different conclusion was reached in Ross v. Schooley (C. C. A.), 257 F. 290, certiorari denied 249 U. S. 615, 29 S. Ct. 390, 63 L. Ed. 803. In the latter case it was said: (quotation) * * *.

Later (Director General v. Ronald (C. C. A.), 265 F. 138), Judge Manton, who took part in the Peck Case first cited, declared:

'Bound as we are by the pronouncement there (in the Ross case) and the reasons therefor, as

expressed by the Supreme Court (Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 36 S. Ct. 482, 60 L. Ed. 874), and more recently adhered to by the denial of the writ in the Ross Case, I conclude that plaintiff below may recover here, irrespective of his engagement in interstate commerce. * * * Liability is expressed and fixed by the statute itself, and is to be found therein. The federal act takes precedence over the state Workmen's Compensation Act.'

Appellant further argues that all power to sue for injury to an employee, except when engaged in interstate commerce, has been taken from our courts, and jurisdiction of all claims for losses sustained conferred on the Compensation Board. Therefore it is insisted that, though a right of action may exist, where there has been a violation of the Safety Appliance Act by one engaged solely in intrastate commerce, yet the state courts have no power to entertain such claims, and any permissible suit must be instituted in some federal tribunal. The act of Congress gave to the employee rights not granted under state laws and our courts have frequently sustained proceedings based on the federal statute in question (Sims v. P. R. R. Co., supra, and cases there cited), and the exercise of this jurisdiction has been approved on appeal to the United States Supreme Court. McMahon v. Montour R. R. Co., supra; Pursglove v. Ry., 285 Pac. 27, 131 A. 477, certiorari denied 270 U. S. 654, 46 S. Ct. 352, 70 L. Ed. 783.

The enforcement of claims arising under the Safety Appliance Act, in personal injury actions is not confined to the federal tribunals. The state courts must always hold themselves open for the

prosecution of civil rights growing out of the laws of the United States. 2 Roberts Federal Liability of Carriers, §877; Claflin v. Houseman, 93 U. S. 130, 23 L. Ed. 833; Murray v. N. W. R. Co. (C. C.), 62 F. 24; Langhill v. P. R. R. Co., 254 Pa. 119, 98 A. 783. Our Workmen's Compensation Act gave to a board exclusive jurisdiction of proceedings to adjudicate claims of employees, which, by consent, express or implied, it was agreed should be so disposed of, and, as to such cases, jurisdiction of the courts to try and determine is ousted. But as to demands not arising from the ordinary relation of employer and employee, such as the enforcement of rights fixed by federal statute, their powers remain as if no such state legislation was in force. It follows that there was power below to entertain the present holding."

That the view hereinbefore set forth has been universally adopted and that the rule so laid down has become a settled principle of law, upon which rights have rested for many many years, is shown by the great body of reported cases that have followed the theory of the *Rigsby* case.

San Antonio Ry. v. Wagner, 241 U. S. 476 at 480;

Penn. R. R. v. Logansport, 29 Fed. (2d) (C. C. A. 7, Ind.);

Detroit Ry. v. Cravens, 13 Fed. (2d) 352 (C. C. A. 6, Mich.);

Devine v. B. & O. R. R., 253 Fed. 948 (C. C. A. 3, Penn.);

Dedinger v. Penn. R. R., 39 Fed. (2d) 799 (C. C. A. 6, Ohio);

St. Louis R. R. v. Smith, 254 Fed. 581 (C. C. A. 5, Tex.);
Tyon v. Wabash Ry., 207 Mo. App. 337;
Carey v. N. Y. Central, 250 N. Y. 345;
Ewing v. Coal & Coke Ry., 82 W. Va. 433;
St. Louis & S. F. R. R. v. Barron, 166 Ark. 647;
Grew v. Boston Ry., 83 N. H. 385;
Sims v Penn. R. R., 279 Pa. 114;
Anderson v. C. & O. Ry., 352 Ill. 561 (cert. den. 290 U. S. 675).

No decision save the one now under review before this court has held that a compulsory Workmen's Compensation Act is the sole remedy of an employee injured by reason of a violation of the Safety Appliance Acts or indeed that the *right and remedy* is *not* created by that act. The cases decided by this court in the October term 1933 *do not so hold.* Those cases will be discussed in order inverse to the dates of their decision.

In *Fairport Ry. v. Meredith,* 292 U. S. 589, this court was called upon to decide whether or not the absolute duty, imposed by the Safety Appliance Acts with regard to power brakes, extended to a traveler on the highway. Although the purpose to protect travelers was not expressed in the act, the court found it present and held that the duty extends to and includes travelers at railway-highway crossings. The court stated:

> "Sections 1 and 9 of the Safety Appliance Act convert this qualified duty imposed by the common law into an absolute duty, from the violation of which *there arises a liability for an injury result-*

ing therefrom to any person falling within the terms and intent of the act."

This court in the same case further held that the question of the defense of contributory negligence did not involve a federal question. In so holding this court said:

> "The Federal Safety Appliance Act as we already have said and this court repeatedly has ruled, imposes absolute duties upon interstate railway carriers and thereby creates correlative rights in favor of such injured persons as come within its purview; but the right to enforce the liability which arises from the breach of duty is derived from the principles of the common law."

This holding followed the decision of this court in *Minneapolis & St. P. R. Co. v. Popplar,* 237 U. S. 369, decided just *before* the *Rigsby* case.

In *Gilvary v. Cuyahoga Valley R. Co.,* 292 U. S. 57, injuries were caused by a violation of the Safety Appliance Act with no interstate commerce involved. Ohio, where the injury occurred, had a compensation act with special provisions as to injuries on railroads. The act had no application where there was interstate commerce. Where intrastate commerce was present, the act applied only, if prior to the accident, both parties *elected* to accept the provisions of the act and the election was approved by the Industrial Commission of Ohio. The only question before this court for decision was whether or not this agreement was repugnant to the provisions of the Safety Appliance Act. (*Leuthe v. Erie R. Co.,* 12 F. Sup. 161.)

We have carefully examined the briefs on file in the *Gilvary* case and find that *counsel for both sides* contended that a right of action for violation of the Safety Appliance Act in favor of one injured, even though he be engaged in intrastate commerce, is created *by the terms of the act itself.* (See Brief on Behalf of Respondent, pages 20, 21, 26 and 27; *Gilvary v. Ry.*, October term 1933, No. 575.)

Counsel for respondent therein admitted the existence of the right of action and contended that it could be *waived by contract.* This court accepted the Ohio court's construction of the Ohio statute and held that the election thereunder was binding.

In *Moore v. Chesapeake & Ohio Ry.*, 291 U. S. 205, plaintiff, a resident of Indiana had sued the defendant corporation, a resident of Virginia, in the Federal District Court in Indiana. The complaint contained two counts: one charged a violation of the Federal Employers' Liability Act (45 U. S. C. A. 51) while plaintiff was engaged in interstate commerce and a violation of the duty imposed by the Safety Appliance Act; the second alleged a violation of the Employers' Liability Act of Kentucky, where the cause of action arose, and a violation of the Safety Act. Pleas in abatement were overruled by the District Court and sustained by the Circuit Court. The Kentucky statute reproduced the provisions of the Federal Employers' Liability Act and the Kentucky legislature read into its local statute the provisions of the Safety Appliance Act. This court held that the first cause of action was properly brought in Indiana. It then held that the

second cause of action was one for a violation of the state act. Since the state statute incorporated the Safety Appliance Act, and, since there was nothing in the federal statute which precluded a state incorporating it, the plaintiff charged a violation *of the state statute*. That the federal right might have been coextensive makes no difference. Thus, since Federal jurisdiction depended solely on diversity of citizenship, the action was properly brought in Indiana. Thus, this case *affirms* a right of action for a violation of the Safety Appliance Act.

Coming back then to our original proposition, we find that no case has held that the *right* arising from a violation of the Safety Appliance Act, can be destroyed by a compulsory compensation act or that the *right and remedy* is not a creation of the federal act. The rule of the *Rigsby* case in this regard has been followed for many years and it should be followed now.

Assuming that the *right* is a creation of the federal statute and that *the remedy* for violation of the right springs from the common law of the states, we come to the question of how far the states can abrogate the right.

It is important to consider that the compensation given under a compulsory Workmen's Compensation Act *is not damages for violation of a right*. It is compensation arising because of a *status* and has nothing to do with *a violation of a duty*.

In *Kenna v. Calumet H. & S. E. R. Co.*, 284 Ill. 301, the court said:

"It is argued that the Workmen's Compensation Act does not conflict with or abrogate any of the provisions of the Safety Appliance Act, but only changes the remedy. The Safety Appliance Act by irresistible inference, as held by the Supreme Court of the United States, confers a private right of action for the death or injury of an employee caused by a violation of its terms. This right of action was to recover compensatory damages for the loss suffered. The Workmen's Compensation Act would take away this right of action and confer instead a right to a sum fixed by statute without regard to the damages in the particular cases except by reference to the wages which the employe was then earning in his particular employment. *The Workmen's Compensation Act substitutes, not a different remedy for the employe, but a different thing for him to recover.*"

In *North Alaska Salmon Co. v. Pillsbury*, 174 Cal. 1, the Supreme Court of California said:

"There is a manifest difference between a compulsory act, like ours, and elective acts, like the Roseberry Act of 1911 (St. 1911, p. 796) and various statutes in other states, under which the compensation provisions are dependent upon the election or consent of the employer and employe. It may well be said that the rights declared by an elective statute have their origin and sanction in the agreement of the parties to be bound by the statute. Under a compulsory statute, however, the correlative rights and obligations are not founded upon contract. *Nor do they correspond with the legal conception of a tort, since a liability is imposed without regard to the element of wrong*

doing on the part of the persons charged. The obligation is to be defined as a statutory one, attached by law to a given status."

In *Alaska Packers Assn. v. Industrial Acct. Com.*, 294 U. S. 532, this court, in discussing the Workmen's Compensation Act of the State of California, spoke as follows:

> *"The liability under workmen's compensation acts is not for a tort. It is imposed as an incident of the employment relationship, as a cost to be borne by the business enterprise, rather than as an attempt to extend redress for the wrongful act of the employer."*

The *"right"* created by the federal statute exists only in so far as it can be enforced by *action. There is no right as distinguished from the right to enforce the liability for the breach of duty.* As the courts have stated, the creation of the duty by Congress gave rise to a correlative *right* and that right can only be a right to recover damages. Regardless of how far the states can *regulate* the particular remedy for a violation of that right, they cannot destroy the right by refusing *any* remedy, any more than they could make "assumption of risk" a defense. This, a compulsory compensation act purports to do, and this, it cannot do.

Consequently whether the *right and remedy* are creations of the federal act, or only the *right* is a creation of the federal act, in neither event, can the right be destroyed by a compulsory compensation act. Therefore, assuming the California act, by its terms

does apply, still the complaint in this action states a cause of action for compensatory damages.

II.

ASSUMING THAT THE EXISTENCE OF ANY REMEDY FOR INJURY, CAUSED BY A VIOLATION OF THE SAFETY APPLIANCE ACTS, IS A MATTER LEFT TO THE STATES AND THAT A STATE CAN ADOPT A COMPULSORY COMPENSATION ACT AND MAKE IT THE SOLE REMEDY, CALIFORNIA, WHERE THE ACCIDENT OCCURRED, HAS NOT DONE THIS.

If the entire matter of the remedy depends on local state law, the problem is to determine that law, and in so doing we look to local court decisions construing state law. This court accepts the meaning and scope given to a state Workmen's Compensation Act by a local state court.

Thornton v. Duffy, 254 U. S. 361;
Burns Mtg. Co. v. Fried, 292 U. S. 487;
Packing Co. v. Parramore, 263 U. S. 418;
Quong Ham Wah v. Corness, 255 U. S. 445.

And see:

Michigan v. Trust Co., 286 U. S. 334;
Express Co. v. Kentucky, 273 U. S. 269;
Smiley v. Kansas, 196 U. S. 447.

Since the Safety Appliance Acts were within the power of Congress to pass, they are part of the law of California to be enforced in its courts.

Claflin v. Hauseman, 93 U. S. 130;
Mondou v. N. Y. Ry., 223 U. S. 1.

Looking then to decisions of the California courts on this precise question, we find that it has there been directly determined.

In *Ballard v. Sacramento Northern Ry.*, 126 Cal. App. 486 (hearing denied by California Supreme Court), Ballard was killed by reason of a defective handbrake maintained by the railroad company on a freight car on a highway of interstate commerce. In answer to the contention that the sole remedy afforded was under the California Workmen's Compensation Act, the court spoke as follows:

> "The contention that the Workmen's Compensation Act applies, we think is without merit. In Smithson etc., v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148 (162 Pac. 111), in speaking of the Federal Employers' Liability Act, which corresponds in force and effect with the Safety Appliance Act, the Supreme Court said, quoting from the syllabus: 'In actions brought in state courts, under the provisions of the Federal Employers' Liability Act approved April 22, 1908, the decisions of the Supreme Court of the United States are controlling in the construction of the act.' Here, jurisdiction to try cases based upon the Federal Safety Appliance Act is vested in district and superior courts. By subdivision 'C' of section 69 of the Workmen's Compensation Act, it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited. We do not need to review the testimony showing that interstate commerce is carried on over the lines of the defendant, further than to state it is sufficient to establish such character,

and the record shows that the defendant practically admitted such character in the trial Court."

In *Walton v. S. P. Co.*, 48 Pac. (2d) 108 (hearing denied by the California Supreme Court August 29, 1935; certiorari denied by this court, December 9, 1935 —*Southern Pac. Co. v. Walton*, October term 1935 No. 548) the identical question presented herein came before the California courts *after the decision in the Moore and Gilvary cases, supra.*

The District Court fully discussed these cases, stated that in an *intrastate* case the state law applied, and then held that the applicable state statute was *not* the Workmen's Compensation Act, but that the remedy was an action for general damages. The court spoke as follows:

"The contention of appellant that the second cause of action is barred by the statute of limitations is untenable. Walton received his injury on March 25, 1930; he died January, 1932. The present action was commenced February 16, 1932, within 45 days after his death. The Boiler Inspection Act is silent as to the time within which an action may be brought, and therefore, under the authorities, about to be referred to, the state law, section 340, subd. 3 of the Code of Civil Procedure, applies, which provides that the action be brought within one year after the death. Moore v. Chesapeake & O. R. Co., 291 U. S. 205, 54 S. Ct. 402, 405, 78 L. Ed. 755 (Feb. 5, 1934). In this case action was brought in two counts: (1) Under Federal Employers' Liability Act; and (2) on the theory that plaintiff was not engaged in

interstate commerce under Safety Appliance Acts and a Kentucky statute. In discussing this subject, the court said:

'In relation to injuries received in that state in intrastate commerce, aside from the particular bearing of the Federal Safety Appliance Acts, the liability of respondent was determined by the laws of Kentucky. * * * Questions arising in actions in state courts to recover for injuries sustained by employees in intrastate commerce, and relating to the scope or construction of the Federal Safety Appliance Acts are, of course, federal questions which may appropriately be reviewed in this court. * * * The Federal Safety Appliance Acts, while prescribing absolute duties, and thus creating correlative rights in favor of injured employees, did not attempt to lay down rules governing actions for enforcing these rights. * * * But the act made no provision as to the place of suit or the time within which it should be brought, or as to the right to recover, or as to those who should be beneficiaries of recovery, in case of the death of the employee. While dealing with assumption of risk, the statute did not affect the defense of contributory negligence and hence that defense was still available according to the applicable state law. (Citing the Schlemmer (220 U. S. 590, 31 S. Ct. 561, 55 L. Ed. 596) and Popplar (237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000) cases.) In these respects the amended act of 1903 made no change. * * *

The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of

the common law * * * and was left to be enforced accordingly, or, in case of the death of the injured employee, according to the applicable statute. * * * 'The Federal statute, in the present case, touched the duty of the master at a single point, and, save as provided in the statute, the right of the plaintiff to recover was left to be determined by the law of the state.'

In Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57, 54 S. Ct. 573, 575, 78 L. Ed. 1123, we find the following: 'Petitioner cites language in Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33, 41, 36 S. Ct. 482, 60 L. Ed. 874. But that case is not in point on the question under consideration in this case. There we were called upon to decide whether a railroad employee engaged in intrastate commerce upon the line of an interstate carrier was within the protection of the Safety Appliance Acts. We held that he was. The opinion supports our recent construction of these acts that, while they prescribe the duty, the right to recover damages sustained by the injured employee, through the breach "spring from the principle of the common law" and was left to be enforced accordingly, or in case of death "according to the applicable statute" '—citing Moore v. Chesapeake & O. R. Co., supra; Minneapolis, St. Paul, etc. Ry. Co. v. Popplar, 237 U. S. 369, 35 S. Ct. 609, 59 L. Ed. 1000. 'These acts do not create, prescribe the measure, or govern the enforcement of, the liability arising from the breach.'

As is said in the Gilvary case, supra, with respect to the Safety Acts: 'They do not extend to the field occupied by the State Compensation Act'.

While these decisions dealt with the Safety Appliance Act, it has been held in a case under the Boiler Inspection Act, where similar questions were raised, that the fact it arose under the latter act is 'a distinction involving no different question'. Rice v. Baltimore & O. R. Co. (C. C. A.), 42 F. (2d) 387, 392.

It thus appears that the Boiler Inspection Act does not purport to provide remedial procedure where it is to be invoked as a ground of recovery for death independently of its application with the Liability Act in an interstate case; hence, in an intrastate case such as this, the state law applies. * * *

The appellant's contentions that the sole remedy of an employee of a common carrier, engaged in interstate transportation, or, in this case, of his personal representative, where, at the time of the injury, the employee was not engaged in interstate transportation, but under circumstances where there has been a violation of duty imposed by the Boiler Inspection Act, is under the State Workmen's Compensation Act are untenable. (St. 1917, p. 831, as amended.) The evidence here shows that the accident happened on a highway of interstate commerce. Reporter's transcript, p. 201, line 18; p. 312, lines 12-19; p. 312, lines 22-26; p. 313, lines 1-5.

Under the authority of Ballard v. Sacramento Northern Railway Co., 126 Cal. App. 486, 14 P. (2d) 1045, 15 P. (2d) 793, the instant suit is maintainable."

The petition for hearing by the California Supreme Court in the *Walton* case was filed after the decision

of the Circuit Court in the Tipton case, and the Tipton decision was urged as a reason why the court should grant a hearing.

Thus the California courts, after fully discussing the *Moore* and *Gilvary* cases, have held, in view of Sec. 69c of the California Workmen's Compensation Act and the general nature thereof (see *North Alaska Salmon Co. v. Pillsbury* and *Alaska Packers Assn. v. I. A. C.*, supra) that said compensation act has no application to an injury received on a highway of interstate commerce, by reason of a violation of a Safety Appliance Act. (It is beyond dispute that except for a situation covered by the compensation act the general right of a servant to sue his master for negligence under the common law exists in California. See *Calif. Civil Code* Secs. 1714, 3281, 3333; *Calif. Political Code* Secs. 4468; *Walton v. S. P.*, supra.)

The California District Court of Appeal is created by the Constitution. (Art. VI, Pars. 1, 4a, 4b.) Its decisions are the "law of the case",

United Dredging Co. v. Corniss, 208 Cal. 705;

Deacon v. Bryans, 212 Cal. 87,

and are binding upon appellate, superior and all lower courts.

Skaggs v. Taylor, 77 Cal. App. 519 at 524.

The state Supreme Court, in passing on petitions for hearing, accepts as correct the facts as stated in the opinion of the Appellate Court (*Burke v. Mayes,* 10 Cal. App. 206, 211), opinion of Supreme Court on denial of hearing), and its order denying a hearing

may be taken as an approval of the *conclusion* reached by the District Court.

Eisenberg v. Superior Court, 193 Cal. 575.

And see,

Bridges v. Fisk, 53 Cal. App. 117 at 122;
People v. Whitaker, 68 Cal. App. 7 at 11;
Clover v. Jackson, 81 Cal. App. 55 at 59;
Masonic Mines v. Sup. Ct., 136 Cal. App. 298 at 300.

Thus the *conclusion* in the *Walton* case is that an action for general damages may be brought in the Superior (lower) Court for an injury or death due to a violation of a Safety Appliance Act in intrastate commerce. Two California Appellate Courts and the California Supreme Court have *held* that the Workmen's Compensation Act is not the "applicable state law" in an action of the character here presented but that an action for general damages in the Superior (lower state) Court may be maintained.

In view of the nature of the California procedure, the decision of this court in *Graham v. White-Phillips Co.,* October term 1934, No. 29 (80 L. Ed. Adv. Ops. p. 62) is not in point.

See, also,

Erie Ry. v. Hilt, 247 U. S. 97;
In re Gilligan, 152 Fed. 605 (cert. den. 206 U. S. 563).

The cause now before this court was commenced in the Superior Court of the State of California, and

removed to the federal District Court on the ground of diversity of citizenship. (R. 30.) In such a case the jurisdiction of the federal court is derivative and it sits in lieu of and for the state court.

Lambert Run Coal Co. v. Ry. Co., 258 U. S. 377.

We thus have decisions of the California Supreme Court construing the California statutes and those decisions are binding on this court. (Cases supra.) Section 69c of the California Compensation Act was obviously designed to provide for the situation now before this court and it has been so construed by the California courts.

Therefore, if we adopt the view that we look solely to the "applicable state statute" in testing the sufficiency of the complaint herein, we find that beyond question, it states a cause of action for general damages.

CONCLUSION.

Since on all possible theories the complaint on file herein states a cause of action for general damages, the judgment of the Circuit Court should be reversed, with directions to the lower court to overrule the demurrer on file herein.

Dated, San Francisco, California,
March 11, 1936.

HERMAN A. BACHRACK,
Attorney for Petitioner.

CLIFTON HILDEBRAND,
LOUIS E. GOODMAN,
LOUIS H. BROWNSTONE,
Of Counsel.

(Appendix Follows.)

Appendix

I.

Safety Appliance Act.

"It shall be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

(Mar. 2, 1893, c. 196 §2, 27 Stat. 531.)

California Workmen's Compensation Act.

Section 6.

"Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against any employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death, in those cases where the following conditions of compensation concur: * * *

b. Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for injury or death. * * *"

Stat. 1929, p. 430.

Section 69.

"c. This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be sub-

ject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the constitution of the United States or the acts of congress."

Section 1714, Civil Code.

Everyone is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief.

Section 3281, Civil Code.

Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.

Section 3333, Civil Code.

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Section 4468, Political Code.

The common law of England, so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state, is the rule of decision in all the courts of this state.

FILE COPY

In the Supreme Court

OF THE

United States

FILED
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CHARLES ELMORE

OCTOBER TERM, 1935

No. 664

J. W. TIPTON,

Petitioner,

vs.

ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY (a corporation),

Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER.

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Respondent.

SUPPLEMENTAL BRIEF FOR PETITIONER.

Supplementing petitioner's brief, we desire to call the court's attention to two matters:

I.

THE CALIFORNIA STATUTES ALLOWING FOR RECOVERY OF DAMAGES, WHERE CONDITIONS OF COMPENSATION UNDER THE WORKMEN'S COMPENSATION ACT DO NOT EXIST, WERE NOT REPEALED BY THE WORKMEN'S COMPENSATION ACT.

On page 29 of petitioner's brief, we stated that "except for a situation covered by the compensation

act the general right of a servant to sue his master for negligence under the common law exists in California."

On page 8 of respondent's brief, it is stated that the California statutes allowing such recovery were repealed by the Workmen's Compensation Act and that no statute exists in California by virtue of which an employee can recover against his master for negligence, where conditions of compensation do not concur.

Counsel for respondent contend that the statutes referred to by them, as being no longer in existence, to-wit: Sections 1969, 1970, and 1971 of the Civil Code of California, were impliedly repealed because of a provision in the California Workmen's Compensation Act of 1917 reading "and all other acts and parts of acts inconsistent herewith are hereby repealed."

This is not correct.

The statutes referred to by counsel for respondent were not repealed by the California Workmen's Compensation Act, but are still in force and effect in California. That such statutes are still in full force and effect is incontrovertible and beyond question.

The Workmen's Compensation Act of 1917, Section 6c, provides that in all cases where conditions of compensation do not concur, the liability of the employer shall be the same as if the act had not been passed. This provision is identical with the provision of the prior Workmen's Compensation Act of 1913, which also contained the identical "repeal" provision hereinbefore quoted.

In *Hackelberry v. Sherlock Co.*, 39 Cal. App. 764, the California Appellate Court held that where conditions of compensation do not concur, all prior statutes, including the statutes hereinbefore referred to, which give to the servant a right of action for damages against his master, are still in force and effect.

This was also held by the Supreme Court in *Robinet v. Hawks*, 200 Cal. 265, following the previous case.

To the same effect, see also:

Weddle v. Heath, 211 Cal. 445;

Elder v. Rose, 63 Cal. App. 545.

It follows therefore that the statement in petitioner's brief, that the servant has a right to sue his master for damages under the common law in California, where conditions of compensation do not concur, is correct.

II.

THE DECISIONS OF THE APPELLATE COURT IN CALIFORNIA IN THE CASE OF BALLARD v. SACRAMENTO RR., 126 CAL. APP. 486, AND WALTON v. SOUTHERN PACIFIC COMPANY, 48 PAC. (2d) 108, HAVE BEEN APPROVED BY THE CALIFORNIA SUPREME COURT, AND ARE THEREFORE BINDING UPON THIS COURT.

Under California practice, the California Supreme Court having approved the decision of the Appellate Court in *Ballard v. Sacramento Northern Ry.*, 126 Cal. App. 486, and *Walton v. S. P. Co.*, 48 Pac. (2d) 108, by denying petitions for hearings, said decisions were the pronouncements of the highest court in California.

In respondent's brief commencing at page 16 thereof, it is stated that the *Ballard* and *Walton* cases supra, are not binding upon this court for the reason that the denial of hearing by the Supreme Court, was not an approval of these opinions, citing *People v. Davis,* 147 Cal. 346, decided July, 1905; *Bohn v. Bohn,* 164 Cal. 532, decided January, 1913; *People v. Rabe,* 202 Cal. 409, decided November, 1927; *Shelton v. City of L. A.,* 206 Cal. 544, decided February, 1929.

However, since the decision in *Shelton v. City of L. A.,* supra, the California Supreme Court has adopted and followed a *different practice.* It has followed a practice whereby in denying petitions for hearing, it approves the opinions of the Appellate Courts, unless, in its order denying petitions for hearing, it expressly withholds approval of any part of the opinion of the Appellate Court. Previous to the adoption of this practice, as pointed out in our brief (p. 30), the denial of a hearing was an approval of the *conclusion* of the District Court. *Now* it is an approval, as well, of the *opinion.*

We have examined the decisions of the Supreme Court of California, denying hearings in all cases reported subsequent to Vol. 125, Cal. App. Reports. We selected this volume as a starting point for the reason that it is the volume which immediately precedes the volume in which the decision in the *Ballard* case supra is reported. We have listed in the appendix to this brief, a long series of orders of the Supreme Court, from that volume (125 Cal. App. Rep.) down to date, for the purpose of showing that

this practice has been consistently and regularly followed by the California Supreme Court.

Therefore in view of this recent and presently existent practice in California, it cannot be disputed, and is now generally recognized in California, that a denial of a petition for hearing by the Supreme Court, after decision by the District Court of Appeal, is an approval by the Supreme Court of the opinion and decision of the Appellate Court, unless otherwise specifically stated in the decision of the Supreme Court upon petition for hearing directed to it. Under California practice, the decisions in the cases of *Ballard* and *Walton,* supra, were decisions of the highest court of the State of California and are binding upon this court.

Dated, San Francisco, California,
March 27, 1936.

Respectfully submitted,
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CLIFTON HILDEBRAND,
LOUIS E. GOODMAN,
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Of Counsel.

(Appendix Follows.)

Appendix

Gill v. Johnson, 125 Cal. App. 296, at 302, October 3, 1932.

A petition for a rehearing in this cause was denied by the District Court of Appeal on August 29, 1932, and an application by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on October 3, 1932, and the following opinion then rendered thereon:

"The Court. The petition for hearing in the Supreme Court is denied.

Our denial of the petition for transfer in this cause is based upon the ground that enough appears on the face of the proceedings to show that Austin is primarily liable for the loss sufferred by respondents and that the Torrens title fund (Stats. 1915, p. 1932) may not be resorted to until an execution against Austin shall have been returned unsatisfied. It was the duty of the court to require the presence of Austin. (Stats. 1915, sec. 105, p. 1932; Code Civ. Proc. sec. 389; O'Connor v. Irvine, 74 Cal. 437, 442 (6 Pac. 236); Mitau v. Rodday, 149 Cal. 1, 8 (6 A. L. R. N. S.) 275, 84 Pac. 145.) Lake v. Dowd, 207 Cal. 290, 293 (277 Pac. 1047).)

We withhold our approval from that portion of the opinion which holds that the demurrer was sufficient in form."

Cullen v. Board of Education, 126 Cal. App. 510, at 513, November 28, 1932.

The petition for a rehearing of this cause was denied by the District Court of Appeal on October 29, 1932, and an application by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 28, 1932, and the following opinion then rendered thereon:

"The Court. The petition for hearing is denied.

In denying a hearing, however, we withhold approval from that portion of the opinion of the District Court of Appeal which holds that the two employments of petitioner constitute but one position."

Anderson v. Board of Education, 126 Cal. App. 514, at 521, November 28, 1932.

The petition for a rehearing of this cause was denied by the District Court of Appeal on October 29, 1932, and the opinion was modified to read as above; and an application by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 28, 1932, and the following opinion then rendered thereon:

"The Court. The petition for hearing is denied.

In denying a hearing, however, we withhold approval from that portion of the opinion of the District Court of Appeal which holds that

the two employments of petitioner constitute but one position."

People v. Cimar, 127 Cal. App. 9, at 15 and 16, October 29, 1932.

A petition for a rehearing of this cause was denied by the District Court of Appeal on October 29, 1932 and an application by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 10, 1932, and the following opinion then rendered thereon:

"The Court. Petitioner's application to have the above entitled cause heard and determined by this court after judgment in the District Court of Appeal of the Third Appellate District is denied. Anything in the opinion in the case of People v. Burns, 75 Cal. App. 84 (251 Pac. 935) contrary to the decision herein is hereby expressly disapproved."

Smellie v. Southern Pac. Co., 128 Cal. App. 567, at 583, March 9, 1933.

A petition for a rehearing of this cause was denied by the District Court of Appeal on February 8, 1933, and an application by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 9, 1933, and the following opinion then rendered thereon:

"The Court. Respondents' petition to have the above-entitled cause heard and determined by this court after judgment in the District

Court of Appeal of the Third Appellate District is denied.

Such denial, however, shall not be construed as an approval by this court of that portion of the opinion of the District Court of Appeal which holds that admission of evidence of the rules adopted by the defendant for the government of its business was incompetent and prejudicial."

Russell v. Ruffcorn, 132 Cal. App. 215, at 232, July 21, 1933.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on July 21, 1933, and the following opinion then rendered thereon:

"The Court. In denying the petition for a transfer of this cause to this court after decision by the District Court of Appeal we withhold approval of that portion of the opinion which declares that the revocation of the permit automatically released the impounded stock. However, under the facts and findings recited by the District Court of Appeal, there can be no doubt but that the plaintiff was equally intent with defendants in his determination to obtain the stock without regard to and in defiance of the order impounding the stock. Hence the doctrine of Domenigoni v. Imperial Live Stock & Mortgage Co., 189 Cal. 467 (209 Pac. 36), concludes the argument of petitioner here. Petition for hearing denied."

Walters v. Du Four, 132 Cal. App. 72, at 88 and 89, July 17, 1933.

A petition for a rehearing of this cause was denied by the District Court of Appeal on June 17, 1933, and an application by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on July 17, 1933, and the following opinion then rendered thereon:

> "The Court. In denying the petition for a hearing of this cause by this court, we withhold our approval of that portion of the opinion which, in effect, sanctions the form and substance of instruction No. 38, but if error was committed in the giving of the instruction (a point which we do not decide), it was cured by instruction No. 8, as indicated in the opinion. Petition denied."

Roy v. Smith, 134 Cal. 240, at 246, November 17, 1933.

A petition by respondents to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 17, 1933, and the following opinion then rendered thereon:

> "The Court. In denying the petition for a hearing in this court we are not to be understood as approving that portion of the opinion of the District Court of Appeal relating to the applicability of the doctrine of res ipsa loquitur in determining the sufficiency of the pleading. The petition for hearing is denied."

Crow v. Board of Supervisors, 135 Cal. App. 451, at 465, January 22, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on January 22, 1934, and the following opinion then rendered thereon:

> "The Court. Appellant's petition to have the above-entitled cause heard and determined by this court, after judgment in the District Court of Appeal of the Third Appellate District, is denied, but the court withholds any opinion with regard to the question as to the proper interpretation of section 20 of article XI of the Constitution."

Jackson & Perkins Co. v. Irrigation Dist., 136 Cal. App. 375, at 381 and 382.

A petition by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 26, 1934, and the following opinion was then rendered thereon:

> "The Court. In denying said petition we withhold our approval of the last paragraph of the opinion of the Appellate Court as the statements therein are not necessary to said decision."

People v. Graves, 137 Cal. App. 1, at 21, March 19, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court

on March 19, 1934, and the following opinion then rendered thereon:

> "The Court. In denying said petition we think it appropriate to state that while we are in accord with the District Court of Appeal in its ruling that it was error for the trial court to refuse to give the instruction regarding circumstantial evidence, we are not entirely satisfied that the error was cured by giving the other instructions referred to in said opinion. However, the court in the closing paragraph of its opinion states that the case is just such a one as is contemplated by the framers of section 4½ of article VI of the Constitution, which provides that no judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. In our opinion, the evidence in the case points unerringly to the guilt of the defendant. We hardly believe that the verdict of the jury in this case would have been any different had the court given the instruction as to circumstantial evidence. We are of the opinion, therefore, that no miscarriage of justice has resulted from said error and that the court properly refused to reverse the judgment on account of said error.
>
> Preston, J. and Langdon, J. voted for a hearing."

People v. Breyer, 139 Cal. App. 547, at 551, August 2, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 2, 1934, and the following opinion then rendered thereon:

> "The Court. The petition of appellant for a hearing of this cause is hereby denied. (8) Said petition, of course, does not ask for a hearing of that portion of the decision of the District Court of Appeal which reverses his conviction under the second count of said indictment. This order denying said petition is, therefore, necessarily confined to that portion of the opinion dealing with appellant's conviction under the first count of said indictment, and is not to be construed as an expression of approval or disapproval of any other portion of said decision."

People v. Aguilar, 140 Cal. App. 87, at 97, August 20, 1934.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 20, 1934, and the following opinion then rendered thereon:

> "The Court. The petition for hearing is denied. In denying said petition we withhold our approval of the statement in the opinion that under section 112 of the California Vehicle Act the crime of driving an automobile by any person upon a public highway while under the in-

fluence of intoxicating liquor is not defined as a felony."

Karle v. Reed, 1 Cal. App. (2d) 144, at 151, November 26, 1934.

A petition by appellants to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on November 26, 1934, and the following opinion then rendered thereon:

"The Court. The petition for a hearing is denied. In denying a hearing, however, we think that the judgment should be affirmed under the provisions of article VI, section 4½ of the Constitution, and we withhold approval of that portion of the opinion of the District Court of Appeal which deals with the admissibility of the contract provision and the propriety of the instruction of the trial court thereon."

Metcalf v. Metropolitan Life Ins. Co., 1 Cal. App. (2d) 481, at 492, December 17, 1934.

A petition for a rehearing of this cause was denied by the District Court of Appeal on November 17, 1934, and an application by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on December 17, 1934, and the following opinion then rendered thereon:

"The Court. The petition is denied. In denying said petition, we withhold our approval of that portion of said opinion relating to section 450 of the Civil Code.

Preston, J., voted for a hearing."

Curtis v. Title Guarantee etc. Co., 3 Cal. App. (2d) 612, at 622, March 14, 1935.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 14, 1935, and the following opinion then rendered thereon:

"The Court. On the record the appeal of the Title Guarantee and Trust Company is correctly decided by the District Court of Appeal.

In addition it may be said that the company dealt with the property as its own, received the money paid by the plaintiff, and the trial court properly found on the evidence that it was not true that said company had turned over to the alleged beneficiaries the money so paid. Acting as principal in the transaction and through its own agent the defendant made no showing that its relationship of trustee, secret and undisclosed so far as the plaintiff was concerned, should relieve it from responsibility as a principal to return the money paid by reason of the fraud of its agent, especially when so fas as the record shows, it continued to retain the money paid by the plaintiff. On the facts the case is ruled on the theory of Wedge v. Security First Nat. Bank, 219 Cal. 113, 25 Pac. (2d) 411; and Speck v. Wylie, supra. To limit the judgment to one against the defendant in its representative capacity only, as was done in Gist v. Security Trust & Savings Bank, 218 Cal. 581, 24 Pac. (2d) 153, would not be justified on the record presented.

By denying a hearing, we do not necessarily approve the apparent holding of the District

Court of Appeal that laches is in every instance an affirmative defense.

The petition for hearing after decision by the District Court of Appeal is denied.

Langdon, J., and Thompson, J., voted for a hearing."

Gerson v. Kelsey, 4 Cal. App. (2d) 158, at 163, March 25, 1935.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on March 25, 1935, and the following opinion then rendered thereon:

"The Court. (6) In denying the petition for a hearing herein, we withhold our approval of the following statement appearing in the opinion: 'The item of interest "at the rate of twelve (12) per cent per annum payable monthly" which was provided for by the terms of the note, is usurious and void.' Such a provision in a note or other contract does not render it usurious. (Haines v. Commercial Mortgage Co., 200 Cal. 609, 625.)"

Walters v. West American Ins. Co., 4 Cal. App. (2d) 581, at 585-586.

A petition for a rehearing of this cause was denied by the District Court of Appeal on March 15, 1935, and an application by respondent to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on April 15, 1935, and the following opinion then rendered thereon:

"The Court. The petition for hearing in this cause is denied upon the ground that the evidence, as held by the District Court of Appeal, Second District, Division Two, fails to establish the existence of an oral contract of insurance. We expressly withhold approval, however, from that portion of the opinion which tends to indicate that an oral contract of insurance, even if shown to exist, would not inure to the benefit of a person injured by the insured and holding an uncollectible money judgment recovered for such injuries. The latter conclusion was unnecessary to the disposition of the cause and we, therefore, refrain from approving the same and express no opinion thereon."

Estate of Moore, 7 Cal. App. (2d) 722, at 726, August 19, 1935.

A petition by appellant to have the cause heard in the Supreme Court, after judgment in the District Court of Appeal, was denied by the Supreme Court on August 19, 1935, and the following opinion then rendered thereon:

"The Court. The petition for hearing in the Supreme Court after decision by the District Court of Appeal, Third Appellate District, is denied. Because of the amendment of Section 1875 subdivision 3, of the Code of Civil Procedure (Stats. 1927, p. 110) relating to judicial notice, we withhold approval of that portion of the opinion of the District Court of Appeal relating to 'the absence of any pleading or proof as to what the law of Texas may be in regard to the subject of adoption'."

Zellerbach Paper Company v. Virden Packing Company, Vol. 91, Cal. Decisions, 265 (not yet officially reported), February 13, 1936.

Petition for hearing after decision by the District Court of Appeal, First District, Division One (83 Cal. App. Dec. 963) denied.

"The petition for hearing after decision by the District Court of Appeal, First District, Division One, is denied. We withhold our approval of that portion of the opinion which holds that the guaranty relied upon by appellant is not a continuing guaranty. Upon that question we expressly refrain from expressing an opinion."

Fitzgerald v. Terminal Devel. Co., 91 Cal. Dec. 441 (not yet officially reported), March 5, 1936.

Petitions for hearing after judgment in District Court of Appeal, Third District (84 Cal. App. Dec. 77) denied.

"The Court. In denying the petitions for hearing herein we withhold approval from that portion of the decision of the District Court of Appeal of the Third Appellate District, to the effect that the deed here involved, even if ineffective as a corporation instrument, was nevertheless a sufficient conveyance from the president of the corporation, as an individual, to vest title in the grantee named therein."

El Claro Oil & Gas Company v. Daugherty, 91 Cal. Dec. 453 (not yet officially reported), March 16, 1936.

Respondent's petition for a hearing after decision in the District Court of Appeal denied.

"The Court. In denying respondent's petition for a hearing in this court, we withhold our approval from those portions of the opinion of the District Court of Appeal which hold, or can be construed as holding, that the three instruments therein considered were not, when issued separately, within the meaning of section 2, division (a), paragraph 7, of the Corporate Securities Act. It is not necessary to determine these questions at this time. We are convinced that the transactions here involved, when entered into without a permit, constitute a violation of the act.

The petition is denied."

FILE COPY

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 664.

J. W. Tipton,

Petitioner,

vs.

Atchison, Topeka & Santa Fe Railway Company (a corporation),

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

ROBERT BRENNAN,

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LEO E. SIEVERT,

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Petition for Certiorari Does Not Disclose That This Case Is One of Such Peculiar Gravity and General Importance as to Require a Review by This Court of the Decision of the Circuit Court of Appeals Herein, nor Does It Appear That There is a Conflict of Decisions Concerning the Statutes Involved.

Petitioner's statement of the case is in error in reciting that petitioner's complaint alleged that petitioner was injured while in the employ of the Southern Pacific Com-

pany, a corporation. The complaint alleged and the fact is that the petitioner at the time of his alleged injury was in the employ of respondent, The Atchison, Topeka and Santa Fe Railway Company, a corporation.

In the courts below petitioner presented his complaint and his appeal upon the theory that, despite the fact that at the time of his alleged injury he was not engaged in interstate commerce and therefore not within the influence of the Act of Congress commonly referred to as the Federal Employers Liability Act, nevertheless he was entitled to maintain an action for damages against his employer by reason of an alleged violation of the Federal Safety Appliance Act. No reference was made in either of the courts below to any claim that he had a right to sue for damages under any California statute. It is indeed strikingly singular that upon this petition for certiorari petitioner abandons the grounds heretofore urged in the courts below and presents to this court an entirely different question. According to the petition the question presented to this court is whether or not an employee in California, not engaged in interstate commerce, is remitted to his rights under the California Workmen's Compensation Act, or whether he has a right to sue for damages under any California statute.

Article 22, Section 21, of the California Constitution as amended November 5, 1918, vested in the State Legislature plenary and unlimited power to create and enforce a complete system of workmen's compensation, to create and enforce a liability on the part of any or all persons to compensate any or all of their workmen for injury or disability irrespective of the fault of any party. Pursuant to this Constitutional mandate the California State

Legislature enacted Act 4749 of the General Laws which at the time of the happening of the accident complained of contained the following pertinent provisions:

> "Sec. 6. *Employer's Liability.* (a) Liability for the compensation provided by this act *in lieu of any other liability whatsoever to any person shall* without regard to negligence exist against an employer for any injury sustained by his employees arising out of and in the course of the employment. * * *
>
> "Sec. 7. *Employer Defined.* The term 'employer' as used in Section 6, etc., shall be construed to mean * * * every person, firm, voluntary association and private corporation, including any public service corporation, who has any person in service under any appointment or contract of hire, express or implied, oral or written. * * *"

The Act provides for the establishment of an industrial accident commission for the making of claims, holding of hearings, taking of evidence, and making of awards and enforcement thereof. Section 69 of the Act provides:

> "(a) Whenever this act or any part or section thereof is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment.
>
> * * * * * * * * *
>
> "(c) *Employers Engaged in Interstate Commerce.* This act shall not be construed to apply to employers or employments which according to law are so engaged in interstate commerce as not to be subject to the legislative power of the state *or to employees injured while they are so engaged* except insofar as

this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

The Constitutional amendment and State law have been construed many times by the Supreme Court of the State of California and this Honorable Court.

In *Bartlett Hayward Co. v. Industrial Accident Commission,* 203 Cal. 522, 528, the Supreme Court of California said:

> "It (the amendment to the California Constitution) enabled the legislature to deprive the trial courts of the state of jurisdiction over such disputes (between employer and employee) and to deny to the employee the right to a jury trial."

In *Cooper v. Industrial Accident Commission,* 177 Cal. 685, the Supreme Court of California, at page 687, said:

> "The obvious intent of the act was to substitute its procedure for the former method of settling disputes between * * * master and servant, or employer and employee, by means of actions for damages * * *; and with the uncertainties or inequities incident to jury trials."

In *Western Indemnity Co. v. Pillsbury,* 170 Cal. 686, page 692, the Supreme Court of California employed the following pertinent language:

> "The enactment substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their workmen. The change thus made is radical, not to say revolutionary. In place of the old action, in which the employer was liable only if he, or some one repre-

senting him, had been guilty of negligence or misconduct, the new law imposes upon the employer a liability for any accidental injuries to his employees arising out of the employment—a liability not conditioned upon any negligence of the employer, or any want of negligence on the part of the employee. All that is required is that the injury shall not have been caused by the intoxication or the wilful misconduct of the injured employee. Stating the change another way, the long established doctrines of contributory negligence, of assumption of risk and of negligence of a fellow-servant are by this law swept out of existence, and are given no weight in proceedings by employees against employers on account of injuries received in the employment. * * *"

In *Dominguez v. Pendola*, 46 Cal. App. 220, the California court said at page 224:

"It is asserted that the act is unconstitutional because it divests an injured employee, or the representatives of a deceased employee of the right of trial by jury in violation of Section 7, Article I, of the Constitution of this state; that the act is also unconstitutional because it deprives the superior courts of this state of the jurisdiction conferred upon them by Section 5, Article VI, of the Constitution.

"While these precise points were not urged, apparently, in the case of Western Indemnity Co. v. Pillsbury, 170 Cal. 686 (151 Pac. 398), the court in that case commented upon the objection raised in other states that similar acts were unconstitutional because they deprived both employer and employee of the right to trial by jury, saying that this objection had no application to the law in this state, 'for although our constitution has always contained a provision

securing the right of trial by jury (Art. I, Sec. 7), the legislature is, as we have already pointed out, expressly authorized by section 21 of Article XX to provide for the settlement by arbitration, by a board, or by the courts, of disputes involving the liability of employers. This section, adopted in 1911, worked a repeal *pro tanto,* of any conflicting provision which may have been in force theretofore.' The language above quoted in connection with the language of sections 17½ and 21 of Article XX of the Constitution of California is a complete answer to both contentions of the appellant upon this question.

In *Treat v. Los Angeles Gas & Electric Corp.,* 60 Cal. App. 466, at page 467, the California court elaborates the principle as follows:

"It is provided in paragraph (a) of section 6 of the Compensation Act, italics being ours, that upon the concurrence of several conditions which need not now be specified, 'Liability for the compensation provided by this act, *in lieu of any other liability whatsoever to any person,* shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment and for the death of any such employee if the injury shall proximately cause death. * * *'" (Italics are those of the court quoted.)

In *DeCarli v. Associated Oil Co.,* 57 Cal. App. 310, the California court said at page 311:

"The remedy here provided for has been held to be exclusive of all other statutory or common-law remedies, and the constitutionality of the provision has been upheld in numerous cases. (E. Clemens Horst

> Co. v. Industrial Acc. Com., 184 Cal. 180 (16 A. L. R. 611, 193 Pac. 105.) See, also, Western Metal Supply Co. v. Pillsbury, 172 Cal. 407 (Ann. Cas. 1917E, 390, 156 Pac. 491); San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321 (149 Pac. 586); Dominquez v. Pendola, 46 Cal. App. 220 (188 Pac. 1025); Helme v. Great Western Milling Co., 43 Cal. App. 416 (185 Pac. 510).) As pointed out in these cases the constitution authorizes a complete system of workmen's compensation, and the language employed is comprehensive enough and was intended to include all injuries, irrespective of the manner in which they might occur."

In addition to the foregoing, Section 69 (c) of the California Workmen's Compensation Act itself provides as the only exception that it will not apply to employees injured while they are engaged in interstate commerce so as not to be subject to the legislative power of the state. There is no contention here that petitioner was engaged in interstate commerce at the time of his alleged injury and therefore his case is not within the exemption in the statute.

This court in the case of *Industrial Accident Commission of the State of California and O. J. Burton, Petitioners, v. James C. Davis, etc.*, 259 U. S. 182, 66 L. Ed. 889, held that unless an employee of a railroad was engaged in interstate transportation at the time of his injury, or work so closely related to it as to be practically a part of it, his relation with his employer would be governed by the applicable state statute. To the same effect are *Ill. C. R. Co. v. Behrens*, 233 U. S. 473, 58 L. Ed. 1051, 34 supreme Ct. Rep. 646; *Erie v. Welch*, 242 U. S. 303, 61 L. Ed. 319, 37 Supreme Ct. Rep. 116; *Southern Pa-*

cific v. Industrial Accident Commission, 251 U. S. 259, 64 L. Ed. 258, 40 Supreme Ct. Rep. 130.

It is further significant that the petition does not enlighten this court as to any California statutes under which it is claimed petitioner has a right to sue his employer for damages. The petition is wholly devoid of any suggestion or reference to any California statute affecting the relationship of master and servant other than the California Workmen's Compensation Act. The petition therefore wholly fails to set forth any justiciable question to be decided by this court.

II.

The Decision of the Circuit Court of Appeals in This Case Is Not in Conflict With Any Decisions of Either State or Federal Courts Concerning the California Workmen's Compensation Act.

We understand that this court will invoke its power to review a judgment of a Circuit Court of Appeals only on the ground of a conflict of decisions when the conflict involves some particular statute. So far as we have been able to ascertain there is no conflict, either of state or federal courts, in any construction of the California Workmen's Compensation Act. It is not claimed nor is it shown in the petition wherein any California statute purports to give to petitioner herein any right to sue his employer for damages, or any statute purporting to place petitioner's case in any other category than that covered by the California Workmen's Compensation Act.

Petitioner claims that the decision of the court below conflicts with the decision in *Ross v. Schooley,* 257 Fed. 290, and *Director General v. Ronald,* 265 Fed. 138. These

decisions follow *Texas & Pacific R. Co. v. Rigsby*, 241 U. S. 43. These decisions of the Federal Circuit Courts were prior to the decisions by this court in the cases of *Moore v. Chesapeake & Ohio R. Co.*, 291 U. S. 205, and *Gilvary v. Cuyahoga Valley R. Co.*, 292 U. S. 57. At this point we parenthetically remark that counsel for petitioner again confuses the question presented here. The cases cited in the petition purport to hold that the Federal Safety Appliance Act in and of itself would give to the petitioner a right of action against his employer even though he was not engaged in the furtherance of interstate transportation at the time of his alleged injury. They are not and can not be authority for the point contended for here by petitioner, namely, that the California state statute gives him the right to maintain his alleged cause of action. Furthermore, they were overruled by the *Moore* and *Gilvary* cases, *supra*.

Petitioner places too much reliance on the case of *Ballard v. Sacramento Northern R.*, 126 Cal. App. 486, decided by the Third District Court of Appeal of the State of California (not the Supreme Court of the State of California), and the case of *Walton v. Southern Pacific Co.*, 48 Pac. (2) 108, decided by the First District Court of Appeal of the State of California. Petitioner insists that these two decisions recognize his right to maintain the instant action under some totally unidentified so-called "applicable state statute."

In order wholly to refute the contention of petitioner we point out that the *Ballard* case was decided before the decisions of this court in the cases of *Moore v. C. & O. R. Co.*, *supra*, and *Gilvary v. Cuyahoga V. R. Co.*, *supra*. In order that it may clearly appear that the District Court

of Appeal of the state of California entirely misapprehended the force and effect of Article 69(c) of the California Workmen's Compensation Act, *supra,* we quote all of the language used by the District Court of Appeal of California dealing with the subject:

> "The contention that the Workmen's Compensation Act applies, we think is without merit. In Smithson etc. v. Atchison, T. & S. F. Ry. Co., 174 Cal. 148 (162 Pac. 111), in speaking of the Federal Employees' Liability Act, which corresponds in force and effect with the Safety Appliance Act, the Supreme Court said, quoting from the syllabus: 'In actions brought in state courts, under the provisions of the Federal Employees' Liability Act approved April 22, 1908, the decisions of the Supreme Court of the United States are controlling in the construction of the act.' Here, jurisdiction to try cases based upon the Federal Safety Appliance Act is vested in district and superior courts. By subdivision "C" of Section 69 of the Workmen's Compensation Act, it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited. We do not need to review the testimony showing that interstate commerce is carried on over the lines of the defendant, further than to state it is sufficient to establish such character, and the record shows that the defendant practically admitted such character in the trial court. Under the Safety Appliance Act, it is the absolute duty of the carrier to maintain the several parts of the braking appliances in such condition that they may be safely operated. (Armitage v. Chicago, M. & St. P. Ry. Co., 54 Mont. 38 (166 Pac. 301); LaMere v. Railway Transfer Co.,

125 Minn. 159 (Ann. Cas. 1915C, 667, 145 N. W. 1058).)'

"In the case of Lockhart v. Southern Pac. Co., 91 Cal. App. 770 (267 Pac. 591), the Safety Appliance Act was not involved. The cause was prosecuted under the Federal Employees' Liability Act, and it was not shown that the car upon which the injured workman was engaged was, or ever had been employed in interstate commerce. The same may be said of the case of Johnson v. Southern Pac. Co., 199 Cal. 126 (49 A. L. R. 1323, 248 Pac. 501).

"We do not need to cite the long list of authorities holding that violation of the Safety Appliance Act constitutes negligence. One case only needs to be referred to: Spokane & Inland Ry. Co. v. Campbell, 241 U. S. at page 509 (60 L. Ed. 1125, 36 Sup. Ct. Rep. 683.)"

The only language used by the District Court of Appeal of California in the *Walton* case, *supra*, touching upon the point involved, is as follows:

"Under the authority of Ballard v. Sacramento Northern Railway Company, 126 Cal. App. 486, the instant suit is maintainable."

It will be readily seen from the above quotations that the case of *Ballard v. Sacramento Northern Railway Company, supra,* was decided by the California District Court of Appeal upon the erroneous assumption that the Federal Safety Appliance Act itself created a cause of action. That court held that the Workmen's Compensation Act of California did not apply to the case of an

employe injured while engaged in intrastate commerce for the reason that it believed (according to the then existing decisions) that there was a right of action given to the petitioner by the terms of the Safety Appliance Act itself. This court, in the *Moore* and *Gilvary* cases, *supra,* has ruled exactly to the contrary. The *Ballard* case did not interpret the California Workmen's Compensation Act but attempted to interpret the Federal Safety Appliance Act. The District Court of Appeal in the *Walton* case blindly followed the *Ballard* case without analyzing it and without giving proper consideration to the legal principles involved.

Petitioner herein cites the *Walton* and *Ballard* cases in support of his argument that they are California determinations of California law by California District Courts of Appeal and are therefore binding upon this court. As we have shown, however, each of these cases attempted to interpret the Federal Safety Appliance Act and of course such interpretations are not binding upon this court. We submit that they are erroneous. They are not the law, and are not correct interpretations of the Federal Safety Appliance Act. It will therefore be seen that inasmuch as this court and the California courts have repeatedly held that an employe can not sue his employer, but in case of injury is remitted to his rights under the California Workmen's Compensation Act, the decision of the Circuit Court of Appeals in the case below correctly interpreted the California law.

In view of the fact that the Supreme Court of California (the highest court of the state), in the case of *Alaska Packers Association v. Industrial Accident Commission*, 200 Cal. 579, 253 Pac. 956, stated in unequivocal language, "The California Workmen's Compensation Act provides the *only means* by which an injured employe can recover compensation from his employer for injuries received in the course of and arising out of his employment and it abrogates the common law liability of the master," it is apparent beyond peradventure of doubt that there is no general California statute giving petitioner any right of action for damages under the facts alleged in the complaint herein. There is no common law right of action in California whereby an employe can sue his employer for damages on account of injuries sustained during the course of the employment. There is no statute in California governing the relations of master and servant with respect to injuries or death other than the California Workmen's Compensation Act. This Court has held that the Federal Safety Appliance Act in and of itself gives an employe no right of action. The Federal Employers Liability Act does not touch the instant case inasmuch as petitioner was not engaged in interstate commerce. All of applicant's rights are defined by the California Workmen's Compensation Insurance and Safety Act. The decision of the court below strictly and carefully followed the law as laid down by this Court and the Supreme Court of the state of California.

In conclusion we respectfully submit that the exigencies of this case are not of such importance as to require this Court to grant a writ of certiorari, nor are the decisions of the federal courts or the state courts concerning the statute in question in conflict with the decision of the Circuit Court of Appeals in this case. For these reasons the petition for certiorari should be denied.

Respectfully submitted,

ROBERT BRENNAN,
Attorney for Respondent.

CHARLES H. WOODS,
LEO E. SIEVERT,
Of Counsel.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 664.

J. W. Tipton,

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Respondent.

BRIEF FOR RESPONDENT.

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1935.

No. 664.

J. W. Tipton,

Petitioner,

vs.

The Atchison, Topeka and Santa Fe Railway Company, a corporation,

Respondent.

BRIEF FOR RESPONDENT.

The judgment should be affirmed for the following reasons:

1. The Federal Safety Appliance Act does not give petitioner any independent right to sue his employer.

2. Petitioner's rights are defined by the California Workmen's Compensation, Insurance and Safety Act, within the jurisdiction of the Industrial Accident Commission of the state of California, by appropriate proceedings therein, and not by any action at law in the courts.

NOTE: Petitioner does not contend that the Federal Employers' Liability Act is at all involved in this litigation.

ARGUMENT.

I.

The Federal Safety Appliance Act Does Not Give Petitioner Any Right to Sue His Employer.

This court, in the cases of *Moore v. Chesapeake & Ohio R. Co.,* 291 U. S. 205, 78 L. Ed. 755, and *Minneapolis, St. P. & S. S. M. R. R. Co. v. Popplar,* 237 U. S. 369, 59 L. Ed. 1000, and finally in the case of *Gilvary v. Cuyahoga Valley R. Co.,* 292 U. S. 57, 78 L. Ed. 723, held that where a railroad employee was not engaged in interstate commerce, and sustained injury by reason of an alleged violation of the Federal Safety Appliance Act, the right of such employee to recover or be compensated for his injuries is to be determined by the law of the state wherein the accident happened. This court said:

> "The Safety Appliance Acts having prescribed the duty in this fashion, the right to recover damages sustained by the injured employee through the breach of duty sprang from the principle of the common law (Texas & P. R. Co. v. Rigsby, 241 U. S. 39, 40, 60 L. Ed. 877, 878, 36 Supreme Court 482) and was left to be enforced accordingly, or, in the case of the death of the injured employee, *according to the applicable statute.* (St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 285, 52 L. Ed. 1064, 28 Supreme Ct. 616; Minneapolis, St P. & S. Ste. M. R. Co. v. Popplar, 237 U. S. 369, 59 L. Ed. 1000, 35 S. Ct. 609.) When the Federal Employers' Liability Act was enacted, it drew to itself the right of action for injuries or death of the employees within its purview who were engaged in interstate commerce, including those cases in which injuries were due to a violation of the Safety Appliance Acts. Such an action must

be brought as prescribed in the Federal Employers' Liability Act, and if brought in the state court, it cannot be removed to the federal court, although violation of the Safety Appliance Acts is involved. See St. Joseph & G. I. R. Co. v. Moore, 243 U. S. 311, 61 L. Ed. 741, 37 S. Ct. 278. *With respect to injuries sustained in intrastate commerce,* nothing in the Safety Appliance Acts precluded the state from incorporating in its legislation applicable to local transportation the paramount duty which the Safety Appliance Acts imposed as to the equipment of cars used on interstate railroads. As this court said in Minneapolis, St. P. & S. Ste. M. R. Co. v. Popplar, *supra*, as to an action for injuries sustained in intrastate commerce: 'The action fell within the familiar category of cases involving the duty of master to his servant. This duty is defined by the common law, except as it may be modified by legislation. The federal statute, in the present case, touched the duty of the master at a single point and, save as provided in the statute, *the right of the plaintiff to recover was left to be determined by the law of the state.*'

"We are of the opinion that the second paragraph of the complaint set forth a cause of action under the Kentucky statute and, *as to this cause of action, the suit is not to be regarded as one arising under the laws of the United States.*"

Moore v. C. & O. R. Co., 291 U. S. 205, 78 L. Ed. 755.

"These acts (Safety Appliance Acts) do not create or prescribe the measure or govern the enforcing of the liability arising from a breach. *They do not extend to the field occupied by the state compensation act.*"

Gilvary v. Cuyahoga Valley R. Co., 292 U. S. 57, 78 L. Ed. 723.

If, as petitioner claims, the cases of *Texas & Pacific R. Co. v. Rigsby, supra; Ward v. Erie R. Co.*, 230 N. Y. 230; *McMahon v. Montour R. Co.*, 270 U. S. 628; *Ross v. Schooley*, 257 Fed. 290, and others cited in his brief, hold to the contrary, they must be disregarded in view of the later decisions of this court.

From the foregoing it will be seen, therefore, that the District Court was correct in sustaining respondent's demurrer to the complaint upon the grounds that no right of action could be predicated solely upon an alleged violation of the Federal Safety Appliance Act.

II.

Petitioner's Rights Are Defined by the California Workmen's Compensation, Insurance and Safety Act Within the Jurisdiction of the Industrial Accident Commission of the State of California, by Appropriate Proceedings Therein, and Not by Any Action at Law in the Courts.

The California Workmen's Compensation, Insurance and Safety Act 1917, California Statutes 1917, page 831, as amended (Deering's General Laws, 1931 Edition, at 4749), enacted pursuant to article XX, section 21 of the California Constitution, provides, in part, as follows:

> "Sec. 6. *Employer's Liability.* (a) Liability for the compensation provided by this act in lieu of any other liability whatsoever to any person shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment.
> * * *

"Sec. 7. *Employer Defined.* The term 'employer' as used in section 6, etc., shall be construed to mean * * * every person, firm, voluntary association and private corporation, including any public service corporation, who has any person in service under any appointment or contract of hire, express or implied, oral or written. * * *"

The act provides for the establishment of an Industrial Accident Commission for the making of claims, holding of hearings, taking of evidence, and making of awards and enforcement thereof. Section 69 of the act provides:

"(a) Whenever this act or any part or section thereof is interpreted by a court, it shall be liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment.

* * * * * * * * * *

"(c) *Employers Engaged in Interstate Commerce.* This act shall not be construed to apply to employers or employments which according to law are so engaged in *interstate commerce* as not to be subject to the legislative power of the state or to employees injured while they are so engaged except in so far as this act may be permitted to apply under the provisions of the Constitution of the United States or the acts of Congress."

Petitioner, without citing any cases in support thereof, claims, without quoting them, that sections 1714, 3281 and 3333, of the California Civil Code, and section 4468 of the California Political Code, give him a right to sue his master for negligence in California. These code sections are merely declaratory of the general rule of damages applicable to tort actions and were enacted in

the year 1872. At the same time the California legislature enacted sections 1969, 1970, and 1971 of the Civil Code specifically dealing with the indemnification of an employee by his employer. These last-referred-to statutes were the law in California until legislation was passed pursuant to the amendment of article XX, section 21, of the California Constitution, 1911 (*supra*), authorizing the legislature to create a system of workmen's compensation. These sections and the sections cited by counsel were repealed by article 71, of the California Workmen's Compensation Act of 1917, Statutes 1917, page 8031, which, after repealing specifically certain numbered sections of the Statutes of 1913, contained the following language,

> "And all other acts and parts of acts inconsistent herewith are hereby repealed;".

In view of the foregoing, and the decisions of the California Supreme Court hereinafter considered, any claim that the present action can be maintained upon the authority of the code sections cited by petitioner is so absurd as not to merit further extended argument in reply thereto.

The Supreme Court of California has said:

> "This step (amendment to the California Constitution of 1911) was a distinct innovation in this state respecting the liability and remedies as between employer and employee. It enabled the legislature to deprive the trial courts of this state of jurisdiction over such disputes and to deny to the employee the right to a jury trial. (*Dominguez v. Pendola*, 46 Cal.

App. 220, 128 Pac. 1025.) It also took from the workman many other common-law remedies. As compensation for such deprivations it enabled the Legislature to afford him compensation regardless of his own negligence."

Bartlett Hayward Co. v. Industrial Accident Commission, 203 Cal. 522, 528.

"The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages, either their pleas of negligent acts or omissions in the way of providing suitable places to work, or proper appliances and the like; and with their defenses of assumed risks or of the negligence of fellow-servants, or of contributory negligence; and with the uncertainties or inequities incident to jury trials."

Cooper v. Industrial Accident Commission, 177 Cal. 685.

"The enactment substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their workmen. The change thus made is radical, not to say revolutionary. In place of the old action, *in which the employer was liable only if he or someone representing him,* had been guilty of negligence or misconduct, the new law imposes upon the employer a liability for any accidental injuries to his employees arising out of the employment—a liability not conditioned upon any negligence of the employer, or any want of negligence on the part of the employee."

Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 692.

There is no contention made by petitioner that any of his alleged rights are predicated upon the act of Congress, known as the Federal Employers' Liability Act, *supra.* This Honorable Court in the case of *Industrial Accident Commission v. Davis,* 259 U. S. 182, 66 L. Ed. 888, 42 Sup. Ct. Rep. 489, held that if the Federal Employers' Liability Act does not apply, the California Workmen's Compensation Act does. As was said in the case of *Southern Pacific Co. v. Industrial Accident Commission,* 251 U. S. 259, 64 L. Ed. 258, 40 Sup. Ct. Rep. 130:

> "If the work was part of interstate commerce, the Workmen's Compensation Act of the state is inapplicable, and the judgment must be reversed; otherwise it must be affirmed."

In *Cooper v. Industrial Acc. Com.,* 177 Cal. 685, 687 (171 Pac. 684), it was held:

> "The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable. (Citing *Netherlands American Steam Nav. Co. v. Gallagher,* 282 Fed. 171, 183.)
>
> "The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages."

"It substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees."

Western Indemnity Co. v. Pillsbury, 170 Cal. 686 692 (151 Pac. 398).

"When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common-law remedies."

DeCarli v. Associated Oil Co., 57 Cal. App. 310 (207 Pac. 282).

There is an unbroken line of decisions of the California District Courts of Appeal in conformity with the foregoing cases. Some of these decisions are:

Dominguez v. Pendola, 46 Cal. App. 220, 128 Pac. 1025;

McLain v. Llewellyn Iron Works, 56 Cal. App. 60, 204 Pac. 869;

De Carli v. Associated Oil Co., 57 Cal. App. 310, 207 Pac. 282;

Treat v. Los Angeles Gas & Elec. Corp., 60 Cal. App. 466, 213 Pac. 263;

Treat v. Los Angeles Gas & Elec. Corp., 82 Cal. App. 610, 256 Pac. 447;

Pecor v. Norton-Lilly Co., 111 Cal. App. 241, 295 Pac. 582;

Butler v. Wyman, 128 Cal. App. 736, 18 Pac. (2d) 354;

Burton v. Union Oil Co., 129 Cal. App. 438, 19 Pac. (2d) 9;

Sarber v. Aetna Life Ins. Co., 23 Fed. (2d) 434.

This court, in the case of *Cudahy Packing Co. v. Parramore,* 263 U. S. 418, 68 L. Ed. 366, considering a decision of the Supreme Court of the state of Utah affirming the award of the Utah Industrial Accident Commission under the Workmen's Compensation Act of that state, said:

> "That the statute is constitutional upon its face is established by previous decisions of this court (New York C. R. Co. v. White, 243 U. S. 188, 61 L. Ed. 667, L. R. A. 1917D, 1, 37 Sup. Ct. Rep. 247, Ann. Cas. 1917D, 629, 13 N. C. C. A. 943; Hawkins v. Bleakly, 243 U. S. 210, 61 L. Ed. 678, 37 Sup. Ct. Rep. 255, Ann. Cas. 1917D, 637, 13 N. C. C. A. 959; Mountain Timber Co. v. Washington, 243 U. S. 219, 61 L. Ed. 685, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927; Arizona Employers' Liability Cases (Arizona Copper Co. v. Hammer), 250 U. S. 400, 63 L. Ed. 1058, 6 A. L. R. 1537, 39 Sup. Ct. Rep. 553; Madera Sugar Pine Co. v. Industrial Acc. Commission, 262 U. S. 499, 67 L. Ed. 1091, 43 Sup. Ct. Rep. 604).
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> * * * * * * * *
>
> "It is settled by the decisions of this court and by an overwhelming array of state decisions that such statutes (State Workmen's Compensation Acts) are not open to constitutional objection because they abrogate common-law defenses or impose liability without fault. * * * The modern development and growth of industry, with the consequent changes in the relations of employer and employee, have been so profound in character and degree as to take away in large measure, the applicability of the doctrines upon which rest the common-law liability of the master for personal injuries to a servant, leaving, of necessity, a field of debatable ground where a good deal must be conceded in favor of forms of legislation

calculated to establish new bases of liability more in harmony with these changed conditions. Workmen's compensation legislation rests upon the idea of status, not upon that of implied contract; that is, upon the conception that the injured workman is entitled to compensation for an injury sustained in the service of an industry to whose operations he contributes his work as the owner contributes his capital—the one for the sake of the wages and the other for the sake of the profits. The liability is based, not upon any act or omission of the employer, but upon the existence of the relationship which the employee bears to the employment because of and in the course of which he has been injured. And this is not to impose liability upon one person for an injury sustained by another with which the former has no connection; but it is to say, that it is enough if there be a causal connection between the injury and the business in which he employs the latter—a connection substantially contributory, though it need not be the sole or proximate cause. Legislation which imposes liability for an injury thus related to the employment, among other justifying circumstances, has a tendency to promote a more equitable distribution of the conomic burdens in cases of personal injury or death resulting from accidents in the course of industrial employment, and is a matter of sufficient public concern (Mountain Timber Co. v. Washington, 243 U. S. p. 239, 61 L. Ed. 697, 37 Sup. Ct. Rep. 260, Ann. Cas. 1917D, 642, 13 N. C. C. A. 927), to escape condemnation as arbitrary, capricious, or clearly unreasonable."

The language of the California act is plain and unequivocal. The California Supreme Court and this court have, time and time again, said that it is the only remedy

under the California state law available to an employee seeking to recover from his master for injuries arising out of his employment while he was within the scope of his employment. This court has always held that, in the construction of a state statute, it is bound only by the decisions of the highest court of the state. *Graham v. White Phillips Co.*, decided by this court November 11, 1935, ... U. S. ....., Advance Sheets Vol. 80, Lawyers' Edition, page 62, at 64, contains the following pertinent language:

> "Under Burns Mortgage Co. v. Fried, 292 U. S. 487, 78 L. Ed. 1380, 54 Supreme Court 813, 92 A. L. R. 1193, a definite construction of the negotiable instrument law by the state Supreme Court, binding on the local tribunals, must be accepted by the federal courts."

This court then referred to a decision by the appellate department of the Illinois courts and, after quoting therefrom, said:

> "The state Supreme Court denied an application for certiorari without more. The argument is that this amounted to approval of the construction placed upon the statute by the appellate court. The point is not well taken."

This court then went on to say that the Illinois Supreme Court had declared "that denial of certiorari does not import approval of the reasons assigned by the lower court," citing *People ex rel. Hoyne v. Grant*, 283 Ill. 391, 397, 119 N. E. 344.

In the case of *Quong Ham Wah Co. v. Industrial Accident Commission of California,* 255 U. S. 445, 65 L. Ed. 723, this court said:

> "But it is elementary that this court is without authority to review and revise the construction affixed to a state statute as to a state matter by the court of last resort of the state. (Commercial Bank v. Buckingham, 5 How. 317, 342, 12 L. Ed. 169, 181; Johnson v. New York L. Ins. Co., 187 U. S. 491, 496, 47 L. Ed. 273, 275, 23 Sup. Ct. Rep. 194; Ross v. Oregon, 227 U. S. 150, 162, 57 L. Ed. 458, 463, 33 Sup. Ct. Rep. 220; Ann. Cas. 1914C, 224; Ireland v. Woods, 246 U. S. 323, 330, 62 L. Ed. 745, 750, 38 Sup. Ct. Rep. 319; Stadelman v. Miner, 246 U. S. 544, 62 L. Ed. 875, 38 Sup. Ct. Rep. 359; Erie R. Co. v. Hamilton, 248 U. S. 369, 371, 372, 63 L. Ed. 307, 308, 39 Sup. Ct. Rep. 95.)"

In the case of *Burns Mortgage Co. v. Fried,* 292 U. S. 487, 78 L. Ed. 1380, this court said:

> "Section 34 of the Judiciary Act of 1789 directs that the laws of the several states, except where the Constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply. The applicable state statute furnishes the rule of decision for a federal court sitting in the state or outside its borders. And in that court the law must be given the meaning and effect attributed to it by *the highest court of the state,* as if the state court's decision were literally incorporated into the enactment, whatever the federal tribunal's opinion as to the correctness *of the state court's views.* * * *
>
> * * * * * * *

"Until the Supreme Court of Florida holds otherwise, we are justified in construing the act in accordance with what we think its intent, especially as this construction accords with the views of the courts of other states."

However, petitioner claims that the cases of *Ballard v. Sacramento Northern,* and *Walton v. Southern Pacific Co.* hold to the contrary in supporting the position taken by his herein, and are binding upon this court. As we pointed out in our answer to the petition for writ of certiorari herein, the *Ballard* case was decided prior to the cases of *Moore v. C. & O. R. Co., supra,* and *Gilvary v. Cuyahoga Valley R. Co., supra,* and attempted to interpret the Federal Safety Appliance Act, rather than the California Workmen's Compensation Act. We also pointed out that in the *Walton* case the California District Court of Appeal, without citing any authority, merely relied upon the *Ballard* case in justification of the affirmance of the judgment. These two cases were decided by the California District Court of Appeal upon the erroneous assumption that the Federal Safety Appliance Act itself created a cause of action.

Petitioner herein cites the *Walton* and *Ballard* cases and claims that they are binding upon this court. As we have pointed out, this court is bound only by the decision of the Supreme Court of the state, not by any decision of a district court. Petitioner makes the erroneous claim that, by refusing a petition for hearing in the *Ballard* and *Walton* cases, the Supreme Court of California thereby affirmed the legal propositions contained therein. He cites some dicta to that effect, which dicta, however, is not controlling. The Supreme Court of

California, in the case of *People v. Davis,* 147 Cal. 346, once and for all announced the construction which should be placed upon its action in refusing to grant a hearing in a case after decision by a District Court of Appeal. The court said, in part:

> "It is proper to add that the denial in any case of an application for the transfer of a case decided by a District Court of Appeal is not to be taken as an expression of any opinion by this court, or as the equivalent thereof, in regard to any matter of law involved in the case and not stated in the opinion of that court, *nor, indeed, as an affirmative approval by this court of the propositions of law laid down in such opinion.* The course to be pursued by this court in the exercise of its power in any case is a matter in which the objects above stated are the controlling considerations, and it will not hold itself bound even where questions of law alone are involved, to order a transfer of the case, after a decision of the district court, except where it shall appear necessary in order to carry out the above-stated purposes of securing uniformity of decision and the settlement of important questions of law. *The significance of such refusal is no greater than this—that this court does not consider that the interests of justice, or the purposes for which the power was given, require its exercise in the particular case."*

Again, in the case of *Bohn v. Bohn,* 164 Cal. 532, at 537, the Supreme Court of California used the following pertinent language:

> "It is, of course, much to be regretted that opposite rulings should be made in two cases which present identical questions. *But an order by this court, refusing to transfer a cause after judgment in the Dis-*

trict Court of Appeal, does not adopt the opinion of the appellate court so as to give it, in this court, the authoritative effect which one of our own decisions would have. Being now convinced that the order appealed from should be affirmed, we must so declare, even though this view necessarily involves the conclusion that the earlier appeal should have been transferred to this court, and thereupon disposed of by a judgment differing from that rendered in the District Court of Appeal. Indeed, believing, as we do, that the order now under review was properly made, it would be our duty to affirm it, even if this court had itself, in another case, reversed an order similar in all respects."

"Under the authority of People v. Davis, 147 Cal. 346 (81 Pac. 718), and Bohn v. Bohn, 164 Cal. 532 (129 Pac. 981), we are not bound to accept the language as precedent, but should give expression to the reasons for our dissent therefrom."

People v. Rabe, 202 Cal. 409, 418.

"It is true that the law laid down in that case, notwithstanding the denial of a petition for hearing in this court, is not binding here. (People v. Davis, 147 Cal. 346 (81 Pac. 718.)"

Shelton v. City of Los Angeles, 206 Cal. 544, 550.

From the foregoing it will be seen that the Supreme Court of California has repeatedly held that there is no common-law right of action in California whereby an employee can sue his employer for damages on account of injuries sustained during the course of his employment, and that there is no statute in California governing the relations between master and servant with respect to injuries and death other than the California Workmen's

Compensation Act. (*Alaska Packers Assn. v. Industrial Accident Commission, supra.*) The decisions in the *Ballard* and *Walton* cases are erroneous and are not binding either upon the Supreme Court of California nor this court. Until and unless the people of the state of California amend their Constitution and the Legislature, by appropriate legislation, enacts new statutes, or the Supreme Court of California in an authoritative opinion recedes from the position which it has heretofore continuously taken, petitioner's complaint in the court below stated no cause of action under California state statutes.

Conclusion.

Upon the record in this case and from the foregoing, it conclusively appears that, since petitioner, at the time of the alleged accident, was engaged in intrastate commerce, his right to compensation therefor was and is governed exclusively by the provisions of the California Workmen's Compensation, Insurance and Safety Act of 1917; that said complaint did not state a cause of action against respondent herein under any federal statute or any state statute, and that the judgment of the court below is correct and therefore should be affirmed.

Respectfully submitted,

ROBERT BRENNAN,
Attorney for Respondent.

CHARLES H. WOODS,
LEO E. SIEVERT,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

No. 664.—October Term, 1935.

J. W. Tipton, Petitioner,
vs.
Atchison, Topeka & Santa Fe Railway Company.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[April 27, 1936.]

Mr. Justice Roberts delivered the opinion of the Court.

The petitioner, a citizen of California, brought an action against the respondent in the Superior Court of the State to recover for injuries sustained in the course of his employment as a switchman. The complaint recites that the respondent, a Kansas corporation, is a common carrier by railroad in interstate commerce, authorized to transact business in California, and that the line on which the accident occurred is a highway of interstate commerce. The cause of petitioner's injury is alleged to have been a defective coupling apparatus upon a freight car, used in violation of the Federal Safety Appliance Acts.[1] The complaint does not state that, at the time of the accident, petitioner was engaged in interstate commerce. After removal to the federal court a demurrer was filed challenging the complaint for failure to state a cause of action. The demurrer was sustained and leave to amend refused. The Circuit Court of Appeals affirmed, holding that as the petitioner, when injured, was not engaged in interstate commerce, he may seek redress only under the California workmen's compensation act.[2] The petitioner sought review by this court on the ground that the decision conflicts with adjudications of the California courts sustaining the right to maintain an action for damages in like circumstances. We granted certiorari.

The Safety Appliance Acts impose an absolute duty upon an employer and prescribe penal sanctions for breach. The earliest,

[1] March 2, 1893, c. 196, 27 Stat. 531, U. S. C. Tit. 45, §§ 1-7; March 2, 1903, c. 976, 32 Stat. 943, U. S. C. Tit. 45, §§ 8-10; April 14, 1910, c. 160, 36 Stat. 298, U. S. C. Tit. 45, §§ 11-16.

[2] 78 F. (2d) 450.

that of 1893, affected only cars which were being used in interstate commerce. By the Act of 1903 the duty was extended to all cars used upon any railroad which is a highway of interstate commerce.[3] The absolute duty imposed necessarily supersedes the common law duty of the employer. But, unlike the Federal Employers' Liability Act, which gives a right of action for negligence, the Safety Appliance Acts leave the nature and the incidents of the remedy to the law of the states.[4] The Safety Appliance Acts modify the enforcement, by civil action, of the employe's common law right in only one aspect, namely, by withdrawing the defense of assumption of risk.[5] They do not touch the common or statute law of a state governing venue, limitations, contributory negligence, or recovery for death by wrongful act.[6]

In *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33, it was decided that, as the first Safety Appliance Act had been extended by later legislation to equipment used in intrastate transportation upon a railroad which is a highway of interstate commerce, an employe injured as the result of a violation of the act, in respect of a car so used, is entitled to recover for breach of the duty imposed on the carrier. Nothing more was there adjudicated. While the opinion discussed the power of Congress, in connection with such regulation of the instrumentalities of interstate commerce, not only to enlarge the common law duty of the employer and thus alter substantive rights of the employe, but also to afford a correlative remedy, the construction put upon the Safety Appliance Acts was that they remit the person injured to such remedy as the state law affords.

As respects an injury occurring during the course of employment in intrastate activities on a highway of interstate commerce, the question has arisen whether a state may substitute workmen's compensation for the common law or statutory action whereby damages could have been recovered for violation of the Safety Appliance Acts. A number of courts have interpreted the discussion in the

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[3] Section 1, U. S. C. Tit. 45, § 8; *Southern Ry. Co.* v. *United States*, 222 U. S. 20.

[4] *Moore* v. *Chesapeake & O. Ry. Co.*, 291 U. S. 205, 215-216.

[5] *Minneapolis & St. P. R. Co.* v. *Popplar*, 237 U. S. 369, 372.

[6] *St. Louis & I. M. R. Co.* v. *Taylor*, 210 U. S. 281; *Schlemmer* v. *Buffalo R. & P. Ry. Co.*, 220 U. S. 590; *Minneapolis & St. P. R. Co.* v. *Popplar*, 237 U. S. 369, 372; *Texas & P. Ry.* v. *Rigsby*, 241 U. S. 33; *Moore* v. *Chesapeake & O. Ry. Co.*, 291 U. S. 205; *Gilvary* v. *Cuyahoga Valley Ry. Co.*, 292 U. S. 57; *Fairport P. & E. R. Co.* v. *Meredith*, 292 U. S. 589.

Rigsby case as a denial of the power of the states to make the substitution.[7]

This court has recently reaffirmed the principle that the Safety Appliance Acts do not give a right of action for their breach but leave the genesis and regulation of such action to the law of the states. In *Moore* v. *C. & O. Ry. Co.*, 291 U. S. 205, it was held competent to a state to embody the provisions of the Federal Safety Appliance Acts in its own statute and to provide that an employe injured by violation of the federal acts should have a cause of action under the local statute. In *Gilvary* v. *Cuyahoga Valley Railway Co.*, 292 U. S. 57, it was decided that an elective compensation act afforded appropriate redress to an employe injured in intrastate transportation as a result of violation of the Safety Appliance Acts; and it was said that those acts do not dictate or prescribe the method of the enforcement of the liability arising from the breach of the duty they impose, or extend to the field occupied by a state compensation act. In *Fairport, etc. R. R. Co.* v. *Meredith*, 292 U. S. 589, an action in a state court, based upon a violation of the Safety Appliance Acts, this court held the application of the doctrines of contributory negligence and last clear chance by the state court raised no federal questions reviewable here.

In *McMahon* v. *Montour R. Co.*, 270 U. S. 628, cited by the petitioner, the judgment of the state court was reversed, not because that court had held that remedy for breach of the duty imposed by the Safety Appliance Acts was afforded by the state workmen's compensation law, but because of its erroneous decision that the federal acts were inapplicable to the cars used in intrastate operations of the railroad, although it was a highway of interstate commerce.[8]

California is at liberty to afford any appropriate remedy for breach of the duty imposed by the Safety Appliance Acts. Her

[7] *Ross* v. *Schooley*, 257 Fed. 290; *Director General* v. *Ronald*, 265 Fed. 138; *Flanigan* v. *Hines*, 108 Kan. 133, 193 Pac. 1077; *Kraemer* v. *Chicago & N. W. Ry.*, 148 Minn. 310, 181 N. W. 847; *Ward* v. *Erie R. R. Co.*, 230 N. Y. 230, 129 N. E. 886; *Miller* v. *Reading Co.*, 292 Pa. 44, 140 Atl. 618; *Southern Pac. Co.* v. *Henderson*, (Tex. Civ. App.) 208 S. W. 561. *Contra, Delaware, L. & W. R. Co.* v. *Peck*, 255 Fed. 261.

[8] *McMahan* v. *Montour R. Co.*, 283 Pa. 274, 276.

choice in the matter raises no federal question and the federal courts are as much bound as those of California to conform to the remedial procedure she has adopted. There is nothing to prevent her prescribing workmen's compensation, elective or compulsory, in lieu of a common law or statutory action for disability or death arising from a breach of the duty imposed. The question is: has California, as the petitioner insists, excepted from the scope of her workmen's compensation act injuries sustained by an employe engaged in intrastate transportation? The Circuit Court of Appeals thought she had not. Whether this conclusion is right depends upon the force and effect of two District Court of Appeal decisions, which the Supreme Court of the State refused to review.

Ballard v. *Sacramento Northern Railway Company*, 126 Cal. App. 486, was an action by the administratrix of a brakeman who was killed as a result of a violation of the Safety Appliance Acts. The defendant's railroad was a highway of interstate commerce but the decedent was not engaged in interstate commerce at the time of the accident. The complaint contained no count based upon the Federal Employers' Liability Act. Nevertheless, the court, in affirming a judgment for the plaintiff, dealt with the trial court's charge as to contributory negligence as if the action were one brought under the Federal Employers' Liability Act,[9] and referred to the amending Act of 1910,[10] conferring on state and federal courts concurrent jurisdiction of actions for damages under the Liability Act, which has no bearing upon actions brought under the Safety Appliance Acts. The railway company insisted that the state workmen's compensation act afforded the only redress for the decedent's death. In overruling the contention the court cited *Smithson* v. *A. T. & S. F. Ry. Co.*, 174 Cal. 148, a case dealing not with the Safety Appliance Acts but with the Employers' Liability Act, saying that the two statutes correspond in force and effect. The court added (p. 495):

"By subdivision 'C' of section 69 of the Workmen's Compensation Act, it is expressly provided that where interstate commerce questions are presented, resort to the courts is not prohibited."

In *Walton* v. *So. Pac. Co.*, 48 Pac. (2d) 108, plaintiff as administratrix sued for the death of her husband, an employe of the

[9] April 22, 1908, c. 149, 35 Stat. 65, U. S. C. Tit. 45, §§ 51-59.
[10] April 5, 1910, c. 143, 36 Stat. 291, U. S. C. Tit. 45, §§ 56-59.

defendant. The first and third counts were based upon the Federal Employers' Liability Act; alleged the decedent and the defendant were engaged in interstate commerce at the time of the accident; and described the negligence alleged to have caused the decedent's death. The second count was founded upon the Federal Boiler Inspection Act.[11] A trial resulted in a judgment for the plaintiff. Holding that the decedent was not engaged in interstate transportation, the court proceeded to discuss the count framed under the Boiler Inspection Act. It overruled the defendant's contention that the cause of action was barred, basing its decision upon the section of the state code of civil procedure limiting the time ~~for bring~~ within which to bring an action for death. In this connection the court referred to *Moore* v. *C. & O. Ry. Co., supra,* as deciding that the Safety Appliance Acts do not affect the time of bringing suit or govern the right to recover for death; and also noted the statement in *Gilvary* v. *Cuyahoga Valley Ry. Co., supra,* that the right to recover damages sustained by the injured employe "sprang from the principle of the common law" and was left to be enforced accordingly or, in the case of death, "according to the applicable statute", and that the safety acts "do not extend to the field occupied by the State Compensation Act." Correctly holding that the same principles apply in an action under the Boiler Inspection Act as in one under the Safety Appliance Acts, the court said that the former does not purport to provide remedial procedure where it is invoked as a ground of recovery for death caused in an intrastate operation, and added: "Hence, in an intrastate case such as this, the state law applies." Dealing with the defendant's contention respecting the Workmen's Compensation Act, the court said (p. 115):

"The appellant's contentions that the sole remedy of an employee of a common carrier, engaged in interstate transportation, or, in this case, of his personal representative, where, at the time of the injury, the employee was not engaged in interstate transportation, but under circumstances where there has been a violation of duty imposed by the Boiler Inspection Act, is under the State Workmen's Compensation Act are untenable (St. 1917, p. 831, as amended). The evidence here shows that the accident happened on a highway of interstate commerce. . . .

[11] U. S. C. Tit. 45, §§ 22-34.

"Under the authority of Ballard *v.* Sacramento Northern Railway Co., 126 Cal. App. 486, 14 P. (2d) 1045, 15 P. (2d) 793, the instant suit is maintainable."

If these decisions of intermediate courts of appeal, and the refusal of the Supreme Court of California to review them, amount to no more than a judicial construction of the compensation act as having, by its terms, no application in the circumstances, they are binding authority in federal courts.[12] If, on the other hand, the state courts excluded railroad employes injured in intrastate operations from the benefits of the compensation act, not as a matter of construction of the statute, but because they thought the Safety Appliance Acts required the State to afford a remedy in the nature of an action for damages, then the court below was right in disregarding that erroneous construction of the federal acts.[13]

In the *Ballard* case the court thought the Safety Appliance Acts, in addition to imposing a duty, afforded a remedy, and to deny that remedy would be to disregard the mandate of the federal statutes. It was proper, in this view, to construe the language of the compensation act accordingly. In the *Walton case,* while holding the Boiler Inspection Act irrelevant upon the question of the appropriate remedy, the court denied the application of the workmen's compensation law, upon the authority of the *Ballard* case.

The Supreme Court of the State refused to review either of the cases although this court had recently defined the scope of the Safety Appliance Acts in the *Moore* and *Gilvary* cases. If we were convinced that the court acted solely upon a construction of the workmen's compensation law, uninfluenced by the decisions following the supposed authority of the *Rigsby* case, we should not hesitate to hold United States courts bound by such construction of the state statute. But the terms of the state compensation law, and the California decisions construing it, lead us to doubt that this is so.

The act, in Section 6, provides:[14]

"(a) Liability for the compensation provided by this act, in lieu of any other liability whatsoever to any person, shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment. . . .

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[12] *Burns Mortgage Co.* v. *Fried,* 292 U. S. 487, 492.

[13] *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 120.

[14] II Deering's General Laws of California, pp. 2276-7.

"(b) Where such conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this act, shall be the exclusive remedy against the employer for the injury or death; . . . "

Section 69 provides:[15]

"(c) *Employers engaged in interstate commerce.* This act shall not be construed to apply to employers or employments which, according to law, are so engaged in interstate commerce as not to be subject to the legislative power of the state, or to employees injured while they are so engaged, except in so far as this act may be permitted to apply under the provisions of the constitution of the United States or the acts of congress."

Thus, by its plain terms, the compensation law embraces injuries to an employe circumstanced as was the petitioner in this case. Employers or employments in interstate commerce (the phrase used) obviously signifies situations covered by the Federal Employers' Liability Act which gives a right of action for breach. The phrase does not exclude injuries consequent upon violation of the Safety Appliance Acts in intrastate commerce and the remainder of the section evinces a determination that the compensation act shall govern the rights of employes in interstate commerce so far as permissible under the federal laws.[16] As has been shown, these laws do not forbid its application in the instant case.

The Supreme Court of California has repeatedly declared the purpose and effect of the compensation act.

"The enactment substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their workmen. The change thus made is radical, not to say revolutionary. In place of the old action, in which the employer was liable only if he, or someone representing him, had been guilty of negligence or misconduct, the new law imposes upon the employer a liability for any accidental injuries to his employes arising out of the employment—a liability not conditioned upon any negligence of the employer, or any want of negligence on the part of the employé."[17]

"The California Workmen's Compensation Act provides the only means by which an injured employee can recover compensation from his employer for injuries received in the course of and arising out of his employment, and it abrogates the common-law liability of the master for such injuries in the cases to which it is applicable.

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[15] II Deering's General Laws of California, p. 2316.

[16] Compare *Boston & M. R. Co.* v. *Armburg*, 285 U. S. 234.

[17] *Western Indemnity Co.* v. *Pillsbury*, 170 Cal. 686, 692.

(*Netherlands American Steam Nav. Co.* v. *Gallagher*, 282 Fed. 171, 183.) The obvious intent of the act was to substitute its procedure for the former method of settling disputes arising between those occupying the strict relationship of master and servant, or employer and employee, by means of actions for damages. (*Cooper* v. *Industrial Acc. Com.*, 177 Cal. 685, 687 [171 Pac. 684].) It substitutes a new system of rights and obligations for the common-law rules governing the liability of employers for injuries to their employees. (*Western Indemnity Co.* v. *Pillsbury*, 170 Cal. 686, 692 [151 Pac. 398].) When the specified conditions exist, the remedy provided by the act is exclusive of all other statutory or common-law remedies. (*DeCarli* v. *Associated Oil Co.*, 57 Cal. App. 310 [207 Pac. 282].)"[18]

We are not persuaded that if the state courts had thought that California was free to ordain a plan of workmen's compensation in lieu of an action for damages for breach of the duty imposed by the Safety Appliance Acts they would have restricted the scope of the Workmen's Compensation Act as was done in the *Ballard* and *Walton* cases. A definite and authoritative decision that its scope is so limited, and that the appropriate remedy under state law is an action for damages, will, of course, be binding upon federal courts. In the absence of such a pronouncement we are of opinion the Circuit Court of Appeals committed no error in construing the Workmen's Compensation Act as affording the only remedy available to the petitioner.

The judgment is

Affirmed.

Mr. Justice CARDOZO concurs in the result upon the authority of *Gilvary* v. *Cuyahoga Valley Railway Co.*, 292 U. S. 57.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[18] *Alaska Packers Assn.* v. *Industrial Accident Comm.*, 200 Cal. 579, 583. See also *Treat* v. *Los Angeles G. & E. Corp.*, 60 Cal. App. 466; *Treat* v. *Los Angeles G. & E. Corp.*, 82 Cal. App. 610; *Pecor* v. *Norton-Lilly Co.*, 111 Cal. App. 241; *Butler* v. *Wyman*, 128 Cal. App. 736; *Burton* v. *Union Oil Co.*, 129 Cal. App. 438.